Supreme Court, U.S.
FILED

95-247 AUG 11 1995

OFFICE OF THE CLERK

No._____

In The
Supreme Court of the United States

October Term, 1995

MEREX A.G. and PETER C. LACHMANN,
Petitioners,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DANIEL J. O'CALLAGHAN
17 Battery Place
New York, New York 10004
(212) 222-4200
Counsel of Record and
Attorney for Petitioners
Merex A.G. and
Peter C. Lachmann

QUESTIONS PRESENTED

I.

In a just society, do not the Circuit Court proceedings require explanation and correction?

II.

Notwithstanding the Circuit Court's absence of subject matter jurisdiction of the appeal, did not the Circuit Court unfairly act upon the appeal?

III.

Should not Lachmann have been restored as a party plaintiff?

IV.

Should not the contempt rulings have been vacated?

PARTIES

The names of all the parties to the proceeding in the Court whose judgment is sought to be reviewed are as follow: Merex A.G. ("**Merex**")[1], Peter C. Lachmann ("**Lachmann**"), and Fairchild Weston Systems, Inc. ("**Fairchild**").[2]

---

[1]Merex A.G. does not have a parent or subsidiary relationship with another company. Merex A.G. was affiliated through stock ownership with plaintiff Merex Corporation.

[2]This Petition is related to Petition No. 94-736 in that matter identified as *Merex A.G. v. Fairchild Weston Systems, Inc.*, 810 F. Supp. 1356 (S.D.N.Y. 1993), *aff'd*, 29 F.3d 821 (2nd Cir. 1994). Petition for Certiorari No. 94-736, which sought review of a mid-trial FRCP Rule 39(c) "advisory jury" ruling concerning a promissory estoppel claim notwithstanding an FRCP Rule 16(e) Final Pre-Trial Order direction for jury trial of *all* claims in effect for fifteen (15) months prior to trial, was denied by order dated January 9, 1995.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES vi

OPINIONS AND ORDERS BELOW 1

JURISDICTION 2

STATUTORY AND RULE PROVISIONS INVOLVED . . 2

STATEMENT OF THE CASE 2

A. Jurisdiction of the District Court 2

B. Nature of Case, Course of Proceedings, Disposition Below 2

REASONS FOR GRANTING THE WRIT 23

A. Objection to Appellate Jurisdiction 23

B. Lachmann Should Be Restored As A Party Plaintiff 24

C. The Contempt Rulings Should Be Vacated. 24

CONCLUSION 27

APPENDIX A -- ORDER OF
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DENYING MOTIONS FOR ENTRY OF JUDGMENT
AND FOR VACATUR OF SETTLEMENT
AND REINSTATEMENT OF CLAIMS,
DATED MAY 30, 1994 . . . . . 1a

APPENDIX B -- SUMMARY ORDER
OF UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
AFFIRMING JUDGMENT OF THE DISTRICT COURT
DATED APRIL 7, 1995 . . . . . 5a

APPENDIX C -- ORDER OF
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
DENYING REHEARING WITH SUGGESTION
FOR REHEARING EN BANC,
DATED MAY 18, 1995 . . . . . 10a

APPENDIX D -- TRANSCRIPT EXCERPTS
CONCERNING CONTEMPT OF COURT
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
DATED APRIL 29, 1992 . . . . . 12a

APPENDIX E -- NOTICE OF MOTION
TO ADVISE THE COURT AND FOR DIFFERING PANELS
AND AFFIRMATION IN SUPPORT OF MOTION,
ABSENT EXHIBITS,
DATED MARCH 10, 1995,
AND ENDORSED ORDER DENYING RELIEF,
DATED MARCH 17, 1995 . . . . . 14a

APPENDIX F -- NOTICE OF MOTION
FOR ADJOURNMENT AND REASSIGNMENT
AND AFFIRMATION IN SUPPORT
DATED MARCH 17, 1995
AND ENDORSED ORDER DENYING RELIEF

DATED MARCH 20, 1995 . . . . . 20a

APPENDIX G-- NOTICE OF MOTION
FOR RELIEF RE SUBJECT MATTER JURISDICTION,
AFFIRMATION IN SUPPORT DATED MARCH 24, 1995,
FILED MARCH 27, 1995,
AND ENDORSED ORDER OF
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT DENYING RELIEF
DATED APRIL 7, 1995 . . . . . 23a

APPENDIX H - NOTICE OF
MOTION FOR RELIEF RELATING TO
EN BANC REHEARING AND AFFIRMATION IN SUPPORT,
DATED APRIL 12, 1995
AND ENDORSED ORDER GRANTING IN PART
RELIEF REQUESTED
DATED APRIL 26, 1995 . . . . . 29a

APPENDIX I -- NOTICE OF MOTION
AND AFFIRMATION IN SUPPORT OF
MOTION FOR RELIEF CONCERNING JURISDICTION
AND EN BANC PROCEEDINGS,
ABSENT EXHIBITS,
DATED MAY 22, 1995
AND ENDORSED ORDER DENYING RELIEF
DATED JUNE 7, 1995 . . . . . 33a

TABLE OF AUTHORITIES

Page

CASES

Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al., (Second Circuit C.A.No. 94-9002) (the "**LLL&M Dispute**") 23, 25

Allen v. West Point-Pepperell, Inc., 945 F.2d 40 (2nd Cir. 1991) 24

BAII Banking Corp. v. UPG, Inc., 985 F.2d 685 (2nd Cir. 1993) 24

Curko v. William Spencer & Son, Corp., 294 F.2d 410 (2nd Cir. 1961) 25

Hess v. New Jersey Transit Rail Operations, Inc., 846 F.2d 114 (2nd Cir. 1988) 24

Janneh v. GAF Corp., 887 F.2d 432 (2nd Cir. 1989), *cert. denied* 498 U.S. 865, 111 S.Ct. 177 (1989). 24

Kothe v. Smith, 771 F.2d 667 (2nd Cir. 1985) 24

Merex A.G. v. Fairchild Weston Systems, Inc., 810 F. Supp. 1356 (S.D.N.Y. 1993), *aff'd*, 29 F.3d 821 (2nd Cir. 1994) . . . . . ii, 5, 7

Merex A.G. v. Loral Fairchild Corporation and Fairchild Weston Systems, Inc. (EDNY Civ. No. 95 Civ. 0111) 23

Olympia & York v. INA v. FEI, Ltd. (C.A. No. 93-7547); Petition for Certiorari No. 94-1364 (the "**O&Y Dispute**") 25, 27

Polito v. Polito, 121 AD 2d 614,

503 NYS 2d 867 (AD 2 Dept. 1986) 24

R.R. Village Ass'n, Inc. v. Denver Sewer Corp.,
826 F.2d 1197 (2nd Cir. 1987) 23

United States v. Certain Interests In Property, Etc.,
326 F. 2d 109 (2nd Cir. 1964), *cert. denied* 377 U.S.
978, 84 S.Ct 1884 (1965) 24

STATUTES:

United States

28 U.S.C. §1254(1) 2

28 U.S.C. §1332. 2

New York State

N.Y. Civ. Prac. L. & R. §205(a)
(McKinney 1991) ("Termination of Action;
New Action by Plaintiff") 23

N.Y. Civ. Prac. L. & R. §3004
(McKinney 1991) ("Restoration of Benefits
Before Judgment Unnecessary") 24

N.Y. Gen. Oblig. Law §5-701(a)(10)
(McKinney 1989) (the "**Statute of Frauds**"
or the "**Statute**") 2, 3, 5

RULES

Federal Rules of Civil Procedure:

16(e) . . . . . ii, 2
26 3
37 3
39(c) ii
50 6
51 . . . . . 2, 24, 25
52(a) 25
54(b) 26
58 . . . . . 1, 2, 23

Other United States Rules:

28 U.S.C. 22, Code of Federal Regulations, "International Traffic in Arms,"
Parts 127, 130 ("**ITAR**") 2, 7, 8

OTHER AUTHORITIES

Crain's New York Business, Vol. X, No. 37,
September 12-18, 1994 ("***Crain's***") 26

In The

Supreme Court of the United States

October Term, 1995

MEREX A.G. and PETER C. LACHMANN,
Petitioners,

v.

FAIRCHILD WESTON SYSTEMS, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS AND ORDERS BELOW

The Opinion and Order of the District Court which denied Merex's motion for FRCP Rule 58 relief (the "**R. 58 Order**") is not officially reported and appears in Appendix ("**App**") A at 1a. The United States Court of Appeals for the Second Circuit affirmed by Summary Order which officially is not reported and appears in App B at 5a. The order of the United States Court of Appeals for the Second Circuit denying the petition for rehearing *en banc* appears in App C at 10a. The judgment of the District Court appears in App D at 12a.

JURISDICTION

The judgment of the United States District Court for the Southern District of New York was entered on April 29, 1992. An appeal to the United States Court of Appeals for the Second Circuit was denied by Summary Order dated April 7, 1995. A timely petition for rehearing *en banc* was filed on April 21, 1995, and thereafter was denied on May 18, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND RULE PROVISIONS INVOLVED

As outlined in the Appendices, the following provisions are involved: FRCP Rules 16(e), 51 and 58, the New York Gen. Oblig. Law §5-701(a)(10) (the "**Statute of Frauds**" or the "**Statute**"), and 28 U.S.C. 22, Code of Federal Regulations, "International Traffic in Arms, " Parts 127, 130 ("**ITAR**").

STATEMENT OF THE CASE

A. Jurisdiction of the District Court

Subject matter jurisdiction in the United States District Court was grounded upon diversity of citizenship. 28 U.S.C. §1332. Petitioner Merex A.G. ("**Merex**") was alleged to be a corporation or other entity organized and existing pursuant to the laws of the Federal Republic of (West) Germany. Petitioner Peter C. Lachmann ("**Lachmann**") was alleged to be a citizen and national of the Federal Republic of (West) Germany. Respondent, Fairchild Weston Systems, Inc. ("**Fairchild**") was alleged to be a corporation organized and existing pursuant to the laws of the State of Delaware.

B. Nature of Case, Course of Proceedings, Disposition Below

The action commenced in 1985, alleged claims for a commission measured against the $20.3M sale price of two (2) reconnaissance cameras sold by Fairchild to the People's Republic of China ("**PRC**") in September, 1984. In January, *1986*, the court directed that Fairchild move for summary judgment:

> THE COURT: [*I] am not going to spend more than five more minutes on this case*.... The only question is, was there an agreement to pay Merex commissions? Now, show it to me, ... [I] will receive... closing briefs,... and,...if I find that your case has no merit...I will award...sanctions.

The Court limited discovery to 60 days. During this time, Fairchild secreted the existence of key witnesses and writings, particularly secreting Fairchild's Controller, T. Egan ("**Egan**") and Asst. Controller, C. Fanneron ("**Fanneron**"), and their pricing files ("**Pricing Files**"), writings which confirm commission obligation to Merex and Lachmann. Notwithstanding improper prompting by S. Wahl, Fairchild's General Counsel, key dispute participant and witness throughout trial ("**Wahl**"), on the 56th day of the 60-day authorized discovery, Egan revealed the secreted documents. The court directed that Fairchild "[P]roduce *all* relevant files, Rule 26,..." (the "**Rule 26 Order**"). Prior to such production, however, Fairchild presented a motion for summary judgment (the "**Sum. J. Motion**") grounded upon the Statute of Frauds (N.Y. Gen. Oblig. Law §5-701(a)(10) (the "**Statute**"). Thereupon, Fairchild redacted the documents which were produced and did not produce others until after denial of the Sum. J. Motion 2½ years later. Notably, *not produced* until that time was Egan's early-April, 1984, memorandum to: "***Commission - cut-out***" as Fairchild's price to the PRC was being reduced, the format changing from sale/resale to direct sale.

In May, 1986, Petitioners opposed the Sum J. Motion. Two and one half (2½) years later, the court denied the motion. Notwithstanding that 3½ years had elapsed since the action's commencement, discovery had proceeded only for 60 days. As Fairchild failed to produce Fanneron, Petitioners sought his deposition by motion (the "**Rule 37 Motion**"). In May, 1989, a Magistrate-Judge authorized the deposition, however, for completion in one (1) day notwithstanding that 123 pages of Fanneron and Egan 1982-84 handwritten notations were to be reviewed, ruling that the Rule 26 Order was "*[u]nenforceab[le] due to the inevitable uncertainty of its meaning*". In December, 1990, the court denied reconsideration. This was the last time counsel appeared before the court prior to trial, i.e., 2½ years later,

notwithstanding repeated requests by Petitioners for a conference.[3]

The Pre-Trial Order ("**PTO**") states:

2. JURY -- NON-JURY:

Plaintiffs have demanded a ***jury trial of all issues***. ***Fairchild accepts such demand***.

3. AMENDMENTS -- DISMISSALS:

A. Plaintiffs' Request to Amend

Plaintiffs seek to amend the Complaint or *by Court Order upon the submission of this Pre-Trial Order to have such pleading deemed amended*...supporting grounds of... intentional...interference with ... *prospective economic advantage claims*... [B]ased upon... improper interference with...commission rights by "**cutting out**"... commissions ... thereafter secreting the key witnesses knowledgeable... T. Egan... and C. Fanneron .... Comprehensive discovery has occurred ... Fairchild is not prejudiced....

In January, 1991, the 45-page PTO was signed by the court, *ordering presentation to the jury of all claims and defenses, including promissory estoppel* and the tortious interference claims. However, at the April, 1992, trial, the court precluded all admissibility - indeed, all reference - to the Pricing Files:

---

[3]In 1986, Egan testified that there were "no records" of Pricing Files and that Egan had "no recollection" of any such writings. At trial, Mertins, Sr., testified that the PRC would want Fairchild, the manufacturer, in a *direct* contract. This was stated in the Letter of Intent ("**L/Intent**") composed by Neasham to Zhao Fei, in part which states: "*To U.S. Gov't: The [PRC] intends to purchase from Fairchild*...LORAP cameras..." The L/Intent was the premise for *both* Fairchild's (i) first (i.e., 1982, Merex included) application for export license, and (ii) Fairchild's 1985 "renewal" application for (actual) export to the PRC upon the September, 1984, *direct* sale.

> "This Court examined...*all* of the offered... documents and did not find a single one which states Fairchild was to pay Merex a commission on a direct sale...." (810 F. Supp. at 1368 n38).

Nonetheless, the court did **not** so examine these materials. Simply, the court *declined to review more than a small portion of these writings*.[4] Moreover, these documents *do so state* that Fairchild was to pay Merex (and Lachmann) ***commissions on a direct sale***[5].

---

[4]The court denied admissability notwithstanding ***direct*** Fairchild commission obligation to Merex (and Lachmann) in satisfaction of the Statute both prior to and subsequent to the April 6, 1984, change in commission format evidenced in these writings, thus:

> MR. O'CALLAGHAN: Judge, there are more pages I'd like to have addressed.
>
> THE COURT: I have no more pages presented to me, and we are going out. (App S to Petition No. 94-736, at 150a).

[5]Upon court review of the PTO on the first day of trial, for the first time since its submission 15 months earlier, Fairchild objected to the use of ***PTO exhibit numbers***. The court directed that none of Merex's exhibits as numbered - i.e., particularly, evidencing Fairchild's unauthorized redaction/non-production - were to be used, rather, each had to be renumbered, adding that should Merex's counsel represent to the Second Circuit that the court had not granted a conference as had been requested, then: "I'll [the court will] write a letter to the Court of Appeals to hold you in contempt". (A 639, 1578-91). *See* App Q to Petition No. 94-736 at 139a, *et seq.*; *see also*, A 399-400 (6%); A 404 (6%); A 407 (2% and 6%), A 408(2%); Ex Ap. 50 (10%), 89 (8%), 96 (8%-12%) and 161 (8%)).

Initially, Lachmann's written "representation" agreement assured commission compensation to Lachmann upon *any* Germany/Far East sale. Subsequent to the introduction of Fairchild's sale/resale format in late 1982, Lachmann's agreement was re-written in January, 1983, to authorize a commission to Lachmann **only** upon a sale through/with Merex upon "Project Anna". Lachmann testified that in October, 1983, Fairchild unfairly compelled him to withdraw from the project, his commission reduced from 6% to 2%, nonetheless, payable upon *any* Fairchild sale to the PRC. Lay characterized these events: "This is just one of those dirty things you have to do now and then" (A 326-327). Subsequently, upon the direct Fairchild/PRC $20.3M sale, Fairchild renounced all obligation to Lachmann. In 1985, Fairchild offered Lachmann $150,000 in compensation for Lachmann's **unreimbursed** expenses incurred upon Lachmann's thirteen (13) trips to the PRC during two (2) years of dedicated service to Fairchild; however, payable only upon Lachmann's consent not to testify in this action in person or by affidavit on behalf of Merex, unless compelled by district court process. At trial, seven (7) years later, in April, 1992, subsequent to dismissal of all Lachmann claims excepting **quantum meruit** - and absent any PTO enforcement to Lachmann's tortious interference claims - virtually indigent, unemployed since 1983 other than as a "consultant" at nominal income, upon discussion with the court and counsel, Lachmann agreed to accept the same amount as had been offered in 1985. Notably, Lachmann's withdrawal from the trial at that time removed "advisory jury" consideration concerning dismissal of his **quantum meruit** claim upon his written agreement.

Concurrently, the court granted in part Fairchild's R. 50 motion upon the Statute. The court ruled that only Merex's promissory estoppel claim would be presented to the jury, thereupon, notwithstanding *15 months of prejudice*, declared "**advisory**".[6] The ability of Petitioners to present any rebuttal

---

[6]Wahl was a key participant to the *unauthorized*, March/April, 1984 direct Fairchild/PRC negotiations, indeed, the author of Ex 83, the *April 4*, 1984, telex to Lay in which Wahl admitted that the sale was: "*contract directly between FWSI/PRC... ...prices...includes only Lachmann...*" Merex, en route to the PRC, already had been "cut-out".

case, particularly grounded upon the Egan and Fanneron depositions and Pricing Files was precluded upon prejudicial rulings concerning subpoena service and irrelevance.

In order to satisfy a *Fairchild requirement* that Fairchild not document the payment of two (2) "commissions" - Lachmann, Fairchild's consultant, had a written commission agreement, Ex Ap 68, - the transaction assumed an illusory "sale/resale" format from August 24, 1982 through April 6, 1984, assuming a direct Fairchild/PRC sale format on April 6, 1984.[7] Fairchild's **1986 secreted** documents revealed, e.g.:

(i) 30016-18, 10/12/84 — (i) Fairchild's Renewal (i.e., direct to PRC) License and (prior) **identical** License to Merex (#MC185078) **both** grounded upon Neasham's L/Intent: "Issuance of the subject license was predicated on a *letter of intent* received from [the PRC's] NORINCO.... **From the inception date of this license [i.e.,12/10/82] Fairchild has been negotiating with [PRC] to conclude a final contract**. On August 27, 1984, Fairchild was

---

The court denied use of the Fanneron deposition grounded upon insufficiency of subpoena service, notwithstanding that service had been completed and that the court had declined twice to enforce the subpoena or grant a continuance for presentation of Fanneron as a witness. Upon Wahl's request, the court conferred with Fanneron by telephone, but nonetheless denied enforcement of the subpoena which Fanneron admitted properly had been served upon him for trial attendance.

[7]Fairchild's contention for ***"distributorship" is insupportable***: Fairchild conceded an absence of distributorship in all prior LORAP sales (A 1148); the parties agreed that the transaction contemplated only one sale and so the "Sale/Resale", the e.g., "**Red Book**", format prescribed - ("[T]his contract shall ***not be construed or constitute a distributorship agreement*** ...") (Ex Ap 101); likewise, the Circuit's acceptance of this contention was erroneous (29 F.3d at 822). Merex was not to assume title to military equipment in the real sense, nor take possession; rather, sale/resale was proposed *by Fairchild* so as to conceal Fairchild's ITAR obligation for reporting two (2) commissions, one to Lachmann, the other to Merex - the economics of the transaction were unaffected.

		successful in negotiating such contract..."; (ii) a $304.5K commission to Poly; (iii) "No other payments are to be authorized or reported...."[8] [nonetheless, internally, Fairchild records $270K payable to Lee]. (A 422. 374-76);[9] and
(ii)	001-A, 10/22/84	Fairchild's "Program Budget Release" signed by Egan w/notation "Price $20.3M and $614K commissions" payable to: Poly (3½ % or $304.5K), *Lachmann ($40K)*, and Lee [Merex's former Hong Kong translator] ($270K)[10]. (A 422-23, 374-76).

[8]ITAR required that **all** commissions be documented. ITAR Reg. Part 130.

[9]Together with Lay in 1986, upon Fairchild's Sum J. Motion, Redanz, Kraljic's replacement as Contract Administrator for Project Anna, testified that *no fees* were paid to Lee, *nor* were ***ITAR*** required reports presented to the U.S. Government: "No commissions to anyone" and "No reports" - at trial, the court precluded this testimony which evidenced Fairchild's avoidance of reporting the payment of *two* commissions, i.e., one to Lee and a second to Poly, notwithstanding ITAR. Further, the evidence contradicted Fairchild's Sum J. Motion contentions: substantial commissions were payable to Lee and Poly as evidenced in Fairchild writings, indeed, as authenticated by Lay and executed by Redanz in a report to the U.S. Government!

[10]The court ruled that this payment to Lee had "nothing to do with the case", precluding all development of evidence relating to Merex's contended rationale for Fairchild's insistence upon the illusory sale/resale format, as well, contention for ***ITAR*** violations. (A 1466-96).

The court conducted a manifestly unfair trial, e.g., precluding fair cross-examination of all Fairchild witnesses and admitting prejudicial hearsay. Additionally, the near three (3) week trial conducted before a jury reflects relentless disparagement of Petitioners' counsel by the court, particularly relating to the court's efforts to conceal an absence of ruling upon PTO-included tortious interference claims, those upon which for fifteen (15) months Petitioners had prepared for a *jury* trial.

Contempt Rulings

On the next-to-last day of trial, the jury sought additional instruction relating to the testimony of G.G. Mertins (270 pages) in the form of **Juror Request No. 7**, which states:

> "Your Honor, we request a reading of the testimony of Mr. G.G. Mertins ***regarding*** his discussion with Mr. Neasham about the *structure* of the sale with the PRC. We are interested in anything said about the mode of payment. We think this was in 1982." "We also request a reading of the Mr. G.G. Mertins testimony ***regarding feasibility*** of a sale/ resale transaction with Mr. Neasham." (Emphasis added.)

Counsel exchanged lengthy, virtually identical written responses. On the following day, the court ruled Petitioners' counsel in contempt relating to Petitioners' effort to *propose* responses. (*See* App D at 12a, the "*Endorsement*"). It is apparent that the court's direction for response was *not "clear and specific"*, rather contained an *obvious ambiguity -- concerning time*. The court *may* have intended responses limited to the 1982 Mertins-Neasham "face-to-face" meeting, but was *not* explicit. An objective reading of the transcript demonstrates that *both* counsel understood the first Juror Request and its literal, repeated re-statement by the court, viz., "*regarding* discussions ... with Neasham", not only to include such face-to-face meeting, but also, to include Mertins' recollection of that meeting as *repeatedly* restated/ explained by Mertins to *others*, 1983-1986, e.g., to Pighi, Lay and Lachmann.

Similarly, the second Juror Request addressed Mertins' testimony "regarding *feasibility ... with Neasham*", i.e., conversations between Mertins and Neasham at least in 1982, but as with the first part of the Juror Request, also conversations repeated/ explained by Mertins to others, 1983-86, e.g., especially **Pighi**. Counsels' written exchanges reflected this ambiguity, one which should not provide grounds for "intentional" disrespect, rather vacatur.[11] In context of these events, the transcript records a uniquely abusive proceeding:

The Court: .... Mr. O'Callaghan, what is your first...reference? .... Look, if it's something other than Mertins and Neasham discussing, I don't want the citation. .... Just yes or no. T. 1963-64.

Mr. O'Callaghan: ... [A]s I read the question, [it] is so broad, ...

The Court: Counsel, I'm making a ruling. The jury has requested the reading of the testimony ... of "Mr. G.G. Mertins *regarding his discussion* with Mr. Neasham ...[etc.] So it is very specific. ... Is there anything ... that are a discussion between Mertins and Neasham?

Mr. O'Callaghan: Your Honor, there are so many pages. If I might just precisely answer your question in the limited fashion you've directed ...

The Court [Reading transcript]: "Q. Did he tell you what his idea was? Did he tell you? "A. He was begging us to represent him in China." That is not responsive...

---

[11]To Mertins, the "structure of the sale" was *direct*, i.e., pursuant to the L/Intent. The court endeavored to preclude the re-reading of testimony concerning such "structure" upon denial of a Mertins' "response" supportive of a *direct* sale, erroneously contending a "leading" examination. However, the court, not counsel, had undertaken the direct examination, and had solicited the supportive testimony. (*See* T. 1969-71). This circumstance was in the immediate background for the first contempt ruling: *The Court*: "**Would you please shut up...**".

Mr. O'Callaghan: Your Honor, ... that is right on point. .... This is a German witness. ....

The Court: Look, I told you, I'm not going to listen to a lot of your talk. .... It is unresponsive testimony. T. 1966-68.

* * *

The Court: We start at 341... That's a leading question. "Did he state to you in any way that you would be paid..." And the response by Mr. Neasham was totally objectionable:

> "Naturally, as a business, and very experienced in export manager, we would discuss the condition" -- *And I told him to wait because this is typical of the way* ***you*** *conducted* ***your*** *examination.*

Mr. O'Callaghan: Your Honor, you were speaking to the witness. You were speaking to the witness. You were speaking to the witness. "You wouldn't wait for him," meaning Mr. Neasham, "to say it; you would tell him, wouldn't you?" -- indicating to the witness that Mr. Mertins was telling the witness what his condition was. You were *not* speaking to me, your Honor.... That's my recollection. .... Most respectfully, your Honor, I recall distinctly you were speaking to the witness directly, because the conversation was about Mertins saying to Neasham what it was --

The Court: Wait. .... *I'm addressing you. "You wouldn't wait for him to say it; you would tell him."* That's exactly what I'm talking about, the leading question.

Mr. O'Callaghan: Your Honor, I observed this colloquy and you spoke directly to the witness. .... T. 1969-71.

* * *

Mr. O'Callaghan: .... I submit the letter of intent, ... is critical to the understanding of the parties about what the relationship was.

The Court: *The jury is not concerned about that*. They are asking for the structure of the sale, and they're asking for the testimony, Mertins' testimony regarding the feasibility of the sale/resale transaction with Neasham. Please keep that in mind. .... I'm not interested in the letter of intent. Where was the *structure of the sale*?

Mr. O'Callaghan: The *structure of the sale was the letter of intent*, your Honor. I submit that that's exactly what it was.

The Court: 361 is out unless it deals with *the sale/resale, which is what the jury is asking about*.... Is 363 letter of intent, Mr. O'Callaghan?

Mr. O'Callaghan: That's correct, your Honor.

The Court: Did you hear my ruling? Do you still insist on doing it your way and just dragging this procedure out?

Mr. O'Callaghan: Your Honor, I submit *I have to make a record as to what I'm asking to be read*. It's my responsibility.

The Court: Sir, if it is denied in one place, you don't keep repeating it.... T. 1985-86.

* * *

Mr. O'Callaghan: [T]here's a discussion with Mr. Pighi about the sale/resale. I think that's responsive to the *second part of the juror's question*, about the feasibility of a sale/resale....

The Court: You know, Mr. O'Callaghan, you are not going to drag this out. .... It says, "discussion with Mr. Neasham." Mr. Pighi, you know very well, is not Mr. Neasham. ....

Mr. O'Callaghan: I understand that, your Honor. My request --

The Court: **Would you please shut up**. ... what line --

Mr. O'Callaghan: *I had asked* lines 1 to 4 and 9 to 23.

Mr. Klein: Pighi meeting. **The Court**: Is it really? **Mr. Klein**: Yes.

The Court: I find you in *contempt* of this court and fine you $100. .... Mr. O'Callaghan, is that a Pighi meeting? .... That's all I'm asking you. Is it?

Mr. O'Callaghan: *They are addressing the sale/resale --*

The Court: Is it a Pighi --

Mr. O'Callaghan: -- *with Mr. Neasham.*

The Court: Is it a Pighi meeting between Mertins and Mr. Pighi? On line 373.

Mr. O'Callaghan: He is discussing the sale/resale transaction with Mr. Pighi.

The Court: Is Mr. Neasham part of that discussion?

Mr. O'Callaghan: I don't know at this time if Mr. Neasham was present in the room, your Honor. I do know that it relates -

The Court: Oh, come on; stop fudging the issue.

Mr. O'Callaghan: I don't know if he was present in the room.

The Court: Is this a discussion with Mr. Neasham or is it with Mr. Pighi?

Mr. O'Callaghan: I submit, your Honor, he is talking apparently to Mr. Lay and Mr. Pighi. .... *He's addressing the feasibility of this transaction with Mr. Neasham.*

The Court: Now, wait a minute. You've already got a hundred dollars contempt. ... What's next? T. 1989-91.

* * *

Mr. O'Callaghan: Your Honor, I don't want to belabor the point --

The Court: What is the next?

Mr. O'Callaghan: On 374, on 25, the conversation continues with Mr. Pighi, but it's all about the *discussion he* ***had had*** *with Mr. Neasham*, and I submit that is responsive to the juror's question because he is taking the agent's authority to Mr. Pighi, and , realistically, you, yourself have said the principal cannot give authority to the agent -- ....

The Court: That is a question of law. That is not a question of fact for the jury. What is the next?

Mr. Klein: Our next reference is on page 379.

Mr. O'Callaghan: Your Honor, *I had* proposals on 375. This really relates to --[second part of the jury request] .... *the feasibility* -- .... -- *he discussed with Mr. Neasham* .... I don't mean to belabor the point. T. 1992-93.

The Court: What line, because it's a contempt if it is not a discussion with Neasham. What is it? What line Let's be accurate about it. (No response). Sir, what line? If you are going to take up our time, we are going to know what your are talking about. What line?

Mr. O'Callaghan: Your Honor, line 5, the witness says: "If this idea from Neasham to make distributor contract is not acceptable." I submit he is addressing the feasibility of this. He's not doing it directly with Mr. Neasham, but he is directing the feasibility of it.

The Court: ... [T]hat is the *second contempt* citation ... The answer that Mr. O'Callaghan is proposing the Court read, line 2:

"Yes. I told Mr. Pighi, first of all, we have to wait for

> the letter of intent to see what the Chinese really want. "Secondly, if this idea from Neasham to make distributor contract is not acceptable" -- did I read it correctly. Yes. ....

Mr. O'Callaghan: Well, your Honor, I submit --

The Court: I don't care what you submit. I've given you a contempt citation and fine you $100 for that. What is next please?

Mr. O'Callaghan: May I make a standing point about my understanding, so I don't further create disturbance? ... T. 1994.

* * *

Mr. Klein: *Your Honor, 383,...*

The Court: What is *Exhibit 618*?

Mr. Klein: .... It's a March 1983 ... proposal from ... Redanz ... to Mr. Mertins. ....

The Court: *Is it a conversation with Neasham*?

Mr. Klein: Well, the reason is, ... Mr. Mertins says: "This document here is based on Neasham's request that we are sending a message to his headquarters to give us a price quotation for five units."

The Court: *But it is not a conversation, is it*?

Mr. Klein: *No, it's just pursuant --*

The Court: *So I will not allow it*. What is next?[12] .... T.

---

[12]Notwithstanding the Panel's characterization of Fairchild's conduct, Fairchild did *not* "withdraw" its proposals, rather, contended "ambiguity", then, only upon inappropriate court assistance and *subsequent* to the contempt rulings. Further, **the court accepted Fairchild's responses** - e.g., concerning Ex 618 (a Redanz letter) - ***without imposing contempt***, "Court: "***[n]ot* a conversation ....**

1996-7.

* * *

The Court: Is there anything on 397 that has to do with a conversation between Neasham and Mertins about any of the subjects the jury asked?

Mr. O'Callaghan: Your Honor, based on your instruction, I feel I cannot comment on my view on 397 any further.

The Court: You are the one who was asking the questions.

Mr. O'Callaghan: Your honor, *Fairchild* proposed 397.

The Court: Fairchild withdrew it. .... Now, what is it on 397 that is the conversation with Neasham and Fairchild?

Mr. O'Callaghan: In light of your ruling, your Honor, I will not further address 397. ... T. 2005.

* * *

Mr. O'Callaghan: .... There's a *question from the Court* [402] between lines 2 and 7 --

The Court: Just a moment. This is a proposal between yourself and Fairchild. Where is Neasham mentioned here?

Mr. O'Callaghan: Your Honor, I submit that's when he was talking to Mr. Neasham, the spring of '83. It ran from August of '82 into the spring of '83. That's why I addressed it.

So I will allow it." Similarly, at a "*Pighi meeting*" -- *promptly* a "contempt" occurrence for Petitioners' counsel -- Fairchild spoke with impunity: "[P]age 416 ... It refers to a meeting between Mr. Mertins and Mr. Pighi ... *what Mr. Neasham had told him* .... **The Court**: An idea *from Neasham* ... characterization, not ... conversation with Neasham"; then, characteristically, unfairly, to Petitioners' counsel, "[J]ust be careful", T. 2010-11; see similarly, T. 2019-20.

The Court: Where does this refer to a conversation with Mr. Neasham?....

Mr. O'Callaghan: In the context of the trial, the witness spoke to Mr. Neasham.

The Court: Sir, in the context of your Q. and A. --

Mr. O'Callaghan: *I didn't ask him Mr. Neasham's name. In fact, it was the Court.* ....

The Court: Just point out the line and the page. Don't tell me about what you submit. It speaks for itself.

Mr. O'Callaghan: Your Honor, understand, *you asked the witness*: "Did you understand any proposal had been agreed upon between yourself and Fairchild in this period?" *I submit this is the conversation* ***you*** *are referring to with Neasham.*

The Court: *I was asking about a proposal between Mertins and Fairchild.* I asked a direct question, not a word, about what he understood from Neasham or conversations with Neasham. *Contempt No. 3....*

Mr. O'Callaghan: Your Honor, I can't -- I don't know the purpose of your question. It just covers the same period of time as Mr. Neasham.

The Court: Sir, you don't have to know the purpose of my question. You just read the question and read your witness's answer, and you will see what it was. It's perfectly clear. .... T. 2008-2010.

* * *

Mr. Klein: Your Honor, page 416, line 13. It refers to a meeting between Mr. Mertins and Mr. Pighi, but I really can't tell from the answer whether he starts getting into what Mr. Neasham had told him, if you carry it over on to page 417, the questions and the answers.

The Court: He's talking about an idea from Neasham was a dispute or contract. *That's his characterization, not his conversation* with Neasham.

Mr. Klein: ...[O]n ... 416 ...: "... -- [W]hat was the outcome of that meeting relating to the sale/resale Mr. Neasham had discussed with you?"

And then he goes on on the next page to talk about -- and again I can't tell if he's talking about what Merex did or what Merex said to Neasham or what Merex said to Pighi.

The Court: *You see, the questions are so imprecise.*

Mr. O'Callaghan: Your Honor,...I noted this as I went through this.....

The Court: Yes. *Mr. O'Callaghan, just be careful.*

Mr. O'Callaghan: And ... I'm just trying to make my record on behalf of what's occurred here. .... T. 2010-11.

* * *

Mr. Klein: Your Honor, ... [416 ... -- 418] are the two pages *I started talking about before*, where the *witness*, in the context of *discussing a meeting with Pighi, starts talking again about discussions with Neasham*, and it's not clear what he's talking about. ... I think when you look at this to see if the witness is really testifying about a discussion he had with Neasham or not, I'm not ... sure.

The Court: Well, look at it and tell me. (Pause). .... *And if this is a conversation with somebody else, they are talking with Mr. Mertins about the meeting*. .... "Question: ... -- [W]hat was the outcome ... Neasham had discussed with you?" You see, *Mr. O'Callaghan*, when you pose your questions like that, they have to be interpreted literally. *Now, are you talking about* something responsive to the juror's note or aren't you there? You asked the questions.

Mr. O'Callaghan: ...I'm trying to follow this, ... Fairchild ... proposed--

The Court: Sir, is it a discussion with Mr. Neasham?

Mr. O'Callaghan: .... Both sides proposed the same testimony just now.

The Court: .... I didn't ask you what both sides did. I asked you a question. What is your response? Is this responsive to the jury's note?

Mr. O'Callaghan: Your Honor, I -- .... under the burden of your contempt citations --.... -- three times imposed, which I think are improper, I decline to further try to interpret what the record states.

The Court: You asked the questions. This is your examination ....

Mr. O'Callaghan: Your Honor, *Fairchild just was reading this*. I think that they had a proposal to make about it.

The Court: Sir, this is your examination of the witness. Mr. Klein said he didn't know what it was. (Pause).

Mr. O'Callaghan: Your Honor, obviously, page 416, lines 13 to 25, which I proposed and Fairchild agreed to use, referred to the outcome of the discussion that Mr. Neasham had. I submit it is not a conversation with Mr. Neasham, but without it -- but about it.

The Court: Did the jurors ask for that?

Mr. O'Callaghan: My interpretation of the juror's instruction is that they did. You have found me in contempt three times for having that understanding. So I will decline to comment further .... T. 2019-20.

* * *

The Court: The jury's request: "A reading of the testimony of Mertins regarding his discussion with Mr. Neasham about the structure ...[etc.] Now does page 416 respond to that?

Mr. O'Callaghan: Your Honor, I've made my statement. .... It's now noon. I've been sitting here since 10 o'clock. May we take 5 minute? I have a terrible cold. I have medication to take. I would like a five-minute recess.

The Court: What was Mr. O'Callaghan's statement? Lynne, would you read it back to me. (Record read). May I ask you what understanding you are talking about?

Mr. O'Callaghan: Your Honor, I think that -- I think that we have a difference of understanding about the juror's instruction. In good faith, I tried to comply with it. In fact, Fairchild came to the same conclusion about the same pages repeatedly. Obviously, your Honor disagrees. So I think it's appropriate that I don't -- .... -- risk contempt repeatedly because that seems to be the direction of the Court. .... I think it's unfair and oppressive, and I have to submit.

The Court: Mr. Klein, are you offering 415 ...?

Mr. Klein: Your Honor, no. .... [W]e believe they are ambiguous.... Based on our discussion this morning, we are not offering them.

The Court: Mr. O'Callaghan, do you see the difference between the truth and twisting a fact? Five minutes. (Recess) T.2021-22. 12:05 p.m. .... 12:15 p.m. ... All right. Now, talking about page 416, and reading the second part of the request: .... Now, 416 is clearly a conversation with Mr. Pighi. ....: "I told him that this idea from Neasham was a dispute or contract was impossible." .... Now what did he say? What did Mr. Pighi say?, Is that correct, Mr. O'Callaghan? .... Is that responsive?

Mr. O'Callaghan: He was responsive. The witness was responsive to my question.

The Court: Is that responsive to the jury's request?

Mr. O'Callaghan: Your Honor, I decline to respond, if I may, so respectfully, based on your three contempt orders.

The Court: Sir, please.

Mr. O'Callaghan: I offer, if I may, plaintiff's selections as Exhibit 76 and Fairchild's selections which in many ways are simultaneous as plaintiff's 77.

The Court: Sir, now is the time where the record is made as to what both parties either agree or disagree about. And I am making rulings. Mr. Klein has said previously that some of those statements, or whatever, on some exhibit that is not before the Court he withdraws or he doesn't agree with it at this time. So it amounts to a legal zero.

Mr. O'Callaghan: Well, *I submit the exhibits, your Honor. I ask that they be taken concerning this procedure. ....*

The Court: How can you submit something that Mr. Klein does not agree with? [I]f it was identical, all you would have to do is submit it to the reporter,.... The reason I am sitting here painfully going through this is because you said you objected...

Mr. O'Callaghan: Both sides objected. .... [T]he matter of holding me in contempt repeatedly because my understanding is identical to his, ..., is unfair... *Would you take the exhibits, your Honor, so we have a record made of this proceeding*?

The Court: I have told you that those exhibits are worthless because it's just an inter se agreement or preliminary agreement, ... between counsel that counsel has disavowed... T. 2023-26.

Mr. O'Callaghan: Your Honor, I would like to, for the sake of this record today, submit in some fashion the proposals for both sides -- .... -- to sustain my position.

The Court: I have ruled on it. Now you bring it up again.

It's another contempt. You are going to learn to accept rulings and not keep arguing. T. 2032-33.[13]

Inter alia, these rulings should be vacated upon grounds which include *preclusion of all ability for counsel to explain the ambiguity at any time*, as well as:

(i) *First Contempt*: Erroneously, the court integrated the two (2) parts of the Juror Request. The word "*discussion*" does *not* appear in the second part of the Request. Thus, in accord with the Juror Request, Mertins is addressing the "feasibility of a sale/resale transaction with Mr. Neasham". Throughout the 270 page transcript, repeatedly, Mertins so "addressed" such "feasibility ... *with* Mr. Neasham" *with other* Fairchild witnesses, particularly Pighi, so as to demonstrate the "authority" of Neasham -- a central Merex contention found by the jury, nonetheless avoided upon "advisory" dismissal;

(ii) *Second Contempt*: Again, the court improperly integrates the two (2) parts of the Juror Request, i.e., absent the word "discussion".

(iii) *Third Contempt*: Unsuccessful in injudicious efforts to lure Appellants' counsel into another "discussion" contempt-generating ambiguity, the court rules that counsel's unawareness of the court's own "understanding" of the court's own question justifies "contempt". How may this be "fair"?

(iv) *Fourth Contempt*?: The proceedings do not record a "fourth" contempt ruling, but rather the court's continuing efforts to lure Appellants' counsel into

---

[13]Upon a Petitioners' motion which included a complete copy of the contempt proceedings, by Order dated February 2, 1994, the Circuit (McLaughlin, J.), ***authorized*** inclusion into the Record on Appeal of these virtually identical proposals. Unfairly, the affirmance attempts to discredit this allowance.

contempt-generating themes, meanwhile, condoning Fairchild's "ambiguity" references, and in conclusion declining unfairly to accept into the record a copy of counsels' virtually identical proposals, Exs 76, 77, i.e., *written evidence* of the ambiguity.

* * *

Shortly thereafter, the jury returned a General Verdict in favor of Merex. Appeal of the court's dismissal of Merex's **complaint** upon "advisory jury" was affirmed on July 14, 1994, by a Second Circuit Panel (the "**Panel**") presided by McLaughlin, USCJ,...[14]

REASONS FOR GRANTING THE WRIT

A. Objection to Appellate Jurisdiction

The R. 58 Order was *not* properly before the Circuit Court. The Order is ***not*** a "final judgment", nor satisfied FRCP Rule 58 "separate document" requirement. *See R.R. Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2nd Cir. 1987) ("judgment must be set forth on a separate document 'distinct from any opinion or memorandum'"). This objection was presented to the Panel by motion filed March 27, 1995, i.e., post-oral argument, in consequence of research undertaken in response to the Panel's inquiries concerning the jurisdictional standing of Merex's counsel to appeal. The motion was denied on April 7,

---

[14]On March 10, 1995, Petitioners filed a motion advising the Panel that pursuant to N.Y. Civ. Prac. L. & R. §205(a), Merex had commenced an action grounded upon tortious interference with prospective economic advantage against Fairchild ("**Loral/Fairchild**") in the U.S. District Court, EDNY (Civ. No. 95 Civ. 0111). Initially, the action was assigned to Hon. Thomas C. Platt, USDJ. However, upon Petitioners' letter request to Judge Platt relating to the *Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*, dispute (Second Circuit C.A.No. 94-9002) (the "**LLL&M Dispute**"), the matter was reassigned to Hon. Arthur D. Spatt, USDJ. Thereupon, prejudicially, Loral/Fairchild wrote to Judge Spatt advising of the circumstances of the requested reassignment. In consequence, Petitioners filed the above motion which also requested differing Panels concerning these appeals (the "**Motion for Differing Panels**"). The motion was denied on March 17, 1995. *See* App E at 14a.

1995. (*See* App G at 23a.)

B. Lachmann Should Be Restored As A Party Plaintiff

Unfairly, the court interfered with Lachmann's reasonable ability to continue pursuit of his claims. Having conducted an unfair trial, the court pressed Lachmann's acceptance of a settlement (upon 1986 terms) or face the court's stated dismissal of his claims, together with repeated erroneous rulings and unfair sanctions admonitions. It is appropriate that the agreement be vacated and that Lachmann's claims be reinstated. *See Janneh v. GAF Corp.*, 887 F. 2d 432-33 (2nd Cir. 1989) (settlement agreement may be challenged upon showing that signed under pressure); *Kothe v. Smith*, 771 F.2d 667 (2nd Cir. 1985) (pressure by trial court to coerce settlement not permissible).[15]

C. The Contempt Rulings Should Be Vacated.

The court imposed injudicious contempt rulings against Petitioners' counsel and only Petitioners' counsel notwithstanding grounded upon the parties' virtual identical proposed responses to the jury request and virtual identical "understandings".[16] FRCP R. 51 *requires* that the court permit counsel to offer objections and explanations concerning jury instructions. *United States v. Certain Interests In Property, Etc.*, 326 F.2d 109, 116 (2nd Cir. 1964). Consistently, R. 51 has been interpreted to require counsel's "distinct" participation concerning jury instructions: *BAII Banking Corp. v. UPG, Inc.*, 985 F.2d 685 (2nd Cir. 1993) (litigant entitled to have jury instructed if supported by evidence and

---

[15]*See also, Allen v. West Point-Pepperell, Inc.*, 945 F.2d 40, 47 (2nd Cir. 1991) and N.Y. Civ. Prac. L. & R. §3004 (McKinney 1991) ("Restoration of Benefits Before Judgment Unnecessary"). Similarly, the timing of Lachmann's motion to vacate does not preclude this relief. *See Polito v. Polito*, 121 AD 2d 614, 503 NYS 2d 867, -69 (AD 2 Dept. 1986).

[16]*See Hess v. New Jersey Transit Rail Operations, Inc.*, 846 F.2d 114-16 (2nd Cir. 1988): "No one may be held in **contempt** ... unless the **order is clear and specific and leaves no uncertainty in the minds** of those to whom it is addressed."

brought to attention of court); *Curko v. William Spencer & Son, Corp.*, 294 F.2d 410 (2nd Cir. 1961) (R. 51 requires *more* than an objection; the grounds must be stated).[17]

---

[17]On March 17, 1995, upon identification of Panel membership, Petitioners filed a *Motion for Reassignment* grounded upon the prior "advisory jury" affirmance. Additionally, Petitioners sought such relief grounded upon the then pending Motion for Differing Panels, as well as grounded upon the extraordinarily unfair appeal proceedings with otherwise inexplicable reference to "**Partnership**" claims in an appeal identified as *Olympia & York v. INA v. FEI, Ltd.* (the "**O&Y Dispute**"), C.A. No. 93-7547. The *Motion for Reassignment* was denied on March 20, 1995. *See* App F at 20a.

On April 12, 1995, Petitioners filed a "Motion Relating to *En Banc* Rehearing" requesting (i) an extension of time and increased page limit upon filing of an *en banc* petition and permission to include as an exhibit a copy of the complete trial transcript relating to the contempt rulings, notably, a transcript submission **which had been included in the Appendix** upon the appeal. By order dated April 26, 1995, i.e, five (5) days **subsequent** to Petitioners' filing of the *en banc* petition, in part, Petitioners' motion was granted, however, unfairly so "granted": (i) the Petition *en banc* had been required to be filed and so had been filed five (5) days earlier, thus, the relief "granted" already had become ineffective, and (ii) the requirement for inclusion of Appendix pages already had been satisfied - such transcript pages together with complete transcription of the contempt proceedings were included in the Appendix filed with the Circuit Court on September 23, 1993, i.e., seven (7) months earlier. *See* App H at 29a.

By order to show cause, dated November 29, 1993, in the U.S. District Court, SDNY (93 Civ. 8084) (SS), by undersigned counsel, Alison E. Clapp ("**AEC**") sought preliminary relief against identified Defendants including LeBoeuf, Lamb, Leiby & MacRae ("**LLL&M**"), Hon. Diane A. Lebedeff, Acting Justice of the Supreme Court of the State of New York, and identified Justices of the Appellate Division of the Supreme Court of the State of New York (the "**LLL&M Dispute**"). At a proceeding held December 20, 1993, upon injudicious sanction reference, the district court in the LLL&M Dispute denied preliminary relief to AEC, notably absent statutorily required findings/conclusions. FRCP R. 52(a). The LLL&M Dispute has been presented to this Court upon Petition for Certiorari No. 91-249 (denied October 7, 1991) and Petition for Certiorari No. 94-986 and Motion to Defer Consideration dated November 28, 1994 (both denied January 17, 1995). On June 22, 1995, the Second Circuit *en banc* affirmed the denial of all relief to AEC in the LLL&M Dispute in C.A. No. 94-9002.

Two days subsequent to the denial to AEC of preliminary injunctive relief in the LLL&M Dispute, i.e., on December 22, 1993, the argument of the O&Y Appeal was heard, presenting this extraordinary -- and eventually unfair -- discussion:

Timbers, J.: ...You, quite properly representing your client, attacked the district judge. .... [D]id Judge Griese do anything right in this case? T. 2. ....

McLaughlin, J.: Is it perfectly clear on the record that your claim was severed?

Winter, J.: Would you give us the page number in the appendix where the severance occurred pursuant to the order?

O'Callaghan: Yes, your Honor, if you give me a moment.

Winter, J.:I thought that would be at the tip of your tongue. T.3-4.

.... **Winter, J.**: ...[W]as the jury asked specifically to make separate findings on overhead, retention and taxes? **[O&Y Counsel]**: Not at all.

Winter, J.: ...So we have irrelevant evidence that went in and there's an assumption that the jury felt it was relevant and rendered a judgment on certain claims it wasn't told about....

Timbers, J.: That's what the judge said...

Winter, J.: It's not up to FEI to take something out of the jury's consideration, it's up to the judge.

[O&Y Counsel]: The judge didn't do it either.

Timbers, J.: Maybe he was clearly wrong. Why don't you admit that? T.16-18.

* * *

[O&Y Counsel]: The judge asked...repeatedly, "Show me in the record..." And all Mr. O'Callaghan said was, "You severed my third-party claims. Well, it's true.

Winter, J.:That's what he's saying here? **[O&Y Counsel]**:That's right.

McLaughlin, J.: Isn't that enough to take it out? T. 22.

Winter, J.: .... **When they appealed, why couldn't you have cross-appealed?.... Why aren't you arguing that he can't appeal?** T. 23.

Winter, J.: The burden of your argument, as I understand it, is that the ***Partnership claims***, although severed, were, in fact, the basis for the jury verdict.

[O&Y Counsel]: ...[C]orrect.

McLaughlin, J.: The evidence went in. It was charged to the jury, it was summed up and everything, even though there was a severance. T. 33-34.

* * *

Thereafter, on January 4, 1994, the parties filed letters pursuant to direction relating to R. 54(b) jurisdiction. On June 24, 1994, FEI presented to the Second Circuit a letter -- undocketed -- addressing the delay in issuance of a decision. *Nine (9) months after the appeal was heard -- six (6) years after the district court trial severance* -- upon review of a copy of the September 12-18, 1994, *Crain's New York Business*, Vol. X, No. 37 ("***Crain's***"), front-page headline: "**Bankruptcy feared at O&Y...**", with report of a bankruptcy proceeding scheduled for September 16, 1994, FEI filed a *Motion to Expedite Decision* at 11:39 a.m. on September 15, 1994, including as "Ex A", FEI's June 24, 1994, undocketed letter. At 3:30 p.m., on the same day, i.e., on September 15, 1994, FEI was advised that the *Motion to Expedite Decision* was returned, undocketed, with explanation that a Summary Order on the same day had been filed affirming the district court's dismissal upon a *two (2) line* Summary Order,

IV. CONCLUSION: "Modest" Accountability

In the Second Circuit, where is accountability for[18]:

(i) consistent non-enforcement of, indeed, non-reference to, controlling Federal Rules, fifteen (15) months of unmentioned prejudice upon a PTO court-ordered jury trial of the promissory estoppel claim, nonetheless an "advisory jury" *sui generis* affirmance, which is in conflict with prior, unmentioned, Circuit precedent, and with every other Circuit which has considered this topic;

(ii) ten (10) years of voluminously documented judicial unfairness, culminating in groundless, retributive contempt proceedings; and the

(iii) absence of any restraint upon judicial efforts to transfer to this counsel public responsibility for the ten (10) year judicial maladministration and unfairness of these proceedings.

---

together with announcement of "recusal" of Judge Timbers, thus, precluding trial of these Petitioners' counsel's clients' (in Receivership) concededly trial-severed claims in the amount of Five million dollars ($5M). The O&Y Appeal was presented to this Court by Petition for Certiorari No. 94-1364, which petition was denied by order dated April 3, 1995.

[18]By motion dated May 22, 1995, Petitioners sought relief concerning subject matter jurisdiction and relating to the patent unfairness of these several *en banc* appeal proceedings presented by Petitioners' counsel to the Second Circuit. This motion was denied by order dated June 7, 1995. *See* App I at 33a.

In truth, rather than a just consideration, the contempt affirmance appears more to reflect the discomfort with -- and unfair response to -- this counsel's presentation of a meritorious cause, one nonetheless singularly unpopular with some, together with an unfair effort to avoid judicial accountability for a ten (10) year injustice. Lachmann's claims should be reinstated. The affirmance of such a "contempt" spectacle should be vacated. For these reasons, the Petition for a Writ of Certiorari should be granted.

Dated: New York, New York
July 31, 1995

Respectfully submitted,

Daniel J. O'Callaghan, Esq.
Attorney for Petitioners
MEREX A.G. and **PETER C. LACHMANN**
17 Battery Place
New York, New York 10004
(212) 222-4200

APPENDIX A -- ORDER OF UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DENYING MOTIONS FOR ENTRY OF JUDGMENT AND FOR VACATUR OF SETTLEMENT AND REINSTATEMENT OF CLAIMS, DATED MAY 30, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

MEREX A.G., MEREX CORPORATION
and PETER C. LACHMANN

Plaintiffs,

-v-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant.

ORDER

85 Civ. 6596 (MJL)

MARY JOHNSON LOWE, D.J.

Before the Court are motions by plaintiffs, Merex A.G. ("Merex") and Peter C. Lachmann ("Lachmann"), for (i) entry of a judgment upon the April 29, 1992, contempt rulings, pursuant to Rule 58 of the Federal Rules of Civil Procedure, and (ii) a judgment for the vacatur of Lachmann's settlement agreement and reinstatement of his claims.

For the reasons set forth below, all of plaintiffs' motions are denied.

DISCUSSION

Motion for Entry of Judgment with Respect to Contempt Rulings

The motion for entry of judgment with respect to the April 29, 1992, contempt rulings stem from proceedings on that date between the Court and plaintiffs' counsel (the "April 1992 Proceedings"). During the April 1992 Proceedings, the Court held plaintiffs' counsel, Daniel J. O'Callaghan ("O'Callaghan"), in contempt of court. The Court ordered O'Callaghan to pay fines totalling $400.00 and Memo Endorsed transcript excerpts of the April 1992 Proceedings, which related to the contempt charges (the "Endorsement"). On April 30, 1992, O'Callaghan paid the fines and such payment was so noted on the Endorsement.

O'Callaghan contends that in order to appeal the contempt rulings, it is necessary that a judgment be entered pursuant to Rule 58 of the Federal Rules of Civil Procedure. O'Callaghan, in his Memorandum of Law in Support of Motion for Rule 58 Relief (the "Memorandum"), merely cites Rule 58 and then concludes that a Rule 58 judgment, which shall include references concerning the statements and representations made by the Court at the April 1992 Proceedings, must be entered so that an appeal may be taken.

As a preliminary matter this Court notes that Rule 58 is inapplicable to the present situation. Rule 58 applies only in certain circumstances: upon a general verdict of a jury; a decision by the court that a party shall recover only a sum certain or costs; a decision by the court that all relief be denied; a decision by the court granting other relief; or upon a special verdict or a general verdict accompanied by answers to interrogatories. None of these situations are present.

O'Callaghan, in the Memorandum, cites to the application of Rule 58 with respect to the court granting "other relief". O'Callaghan fails to mention and the Court cannot see what "other relief" this Court granted, such that Rule 58 would apply. Thus, this Court finds that Rule 58 is inapplicable.

In response to O'Callaghan's claim that in order to appeal the contempt rulings it is necessary that a judgment be entered pursuant to Rule 58, this Court notes that a judgment has already been entered. Rule 54 of the Federal Rules of Civil Procedure defines "Judgment", as used in the Federal Rules, to include a

decree and any order from which an appeal lies. "[C]ivil contempts against non-parties are immediately appealable because the appeal does not interfere with the orderly progress of the main case," *International Bus. Mach. Corp. v. U.S.*, 493 F.2d 112, 115 n.1, (2d Cir. 1973) , *cert. denied*, 416 U.S. 995 (1974). The Endorsement, is properly considered a judgment because it is a decree from which an appeal lies.

Motion to Vacate Settlement Agreement

Plaintiff, Lachmann, moves to vacate the settlement agreement that was entered into between defendants and Lachmann (the "Agreement"). Approximately two years after the Agreement was entered into, Lachmann claims that he was improperly coerced into entering into the Agreement.

In support of his argument, Lachmann states that he believed that his case would be unfairly dismissed. Lachmann admits that he knew appeal could be taken if his case was dismissed but his counsel advised him that such an appeal would be time-consuming. Lachmann states that he was under extreme financial hardship and was unfairly urged by the Court to accept the settlement.

The trial transcript annexed as part of Exhibit 3 to plaintiffs' moving affirmation clearly demonstrates that Lachmann's claim is without merit. Indeed, the trial transcript shows that the Court questioned Lachmann several times to confirm Lachmann's understanding of the consequences of the settlement. The record is devoid of any evidence that Lachmann was improperly coerced.

A settlement is a contract, and once entered into is binding and conclusive. To permit Lachmann to rescind the settlement agreement would prejudice defendants by depriving them of their bargained for right to avoid further proceedings with Lachmann. *See Janneh v. GAF*, 887 F.2d 432 (2nd Cir 1989). Lachmann does not provide any evidence that he was improperly coerced to settle. Therefore, plaintiffs' motion to vacate the Agreement is denied.

CONCLUSION

For the foregoing reasons, plaintiffs' motions are denied.

It is SO ORDERED.

Dated: New York New York
May 30, 1994

S/Mary Johnson Lowe
United States District Judge

Copies of this order to:

DANIEL J. O'CALLAGHAN, ESQ.
17 Battery Place
New York, New York 10004

ARENT FOX KINTNER PLOTKIN & KAHN
Roy A. Klein, Esq. and Ronald W. Weiner, Esq.
45 Rockerfeller [sic] Plaza
New York, New York 10111

APPENDIX B -- SUMMARY ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT AFFIRMING JUDGMENT OF THE DISTRICT COURT DATED APRIL 7, 1995

85cv6596
SDNY
Mary J. Lowe
NR Buchwald

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City and County of New York on the 7th day of April, one thousand nine hundred and ninety-five.

Present: HONORABLE JOSEPH M. McLAUGHLIN,
HONORABLE DENNIS G. JACOBS,
Circuit Judges
HONORABLE FRANK A. KAUFMAN,[1]
District Judge.

MEREX A.G., and PETER A. LACHMANN,

Plaintiffs-Appellants.

v.

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

No. 94-7648

---

[1]Of the United States District Court for the District of Maryland, sitting by designation.

/seal
UNITED STATES COURT OF APPEALS
FILED
APRIL 7, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

Appeal from the United States District Court for the Southern District of New York (Lowe, J.).

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgment of the district court be and it hereby is AFFIRMED.

In August 1985, Merex A.G. and Peter Lachmann filed suit in the Southern District of New York to recover a commission allegedly due under a modification to a 1983 Sales Representation Agreement among the parties. The complaint alternatively alleged breach of contract, *quantum meruit*, and promissory estoppel. During the trial, Lachmann agreed, at the prodding of the district court, to accept Fairchild's settlement offer of $150,000. The settlement was then placed on the record. In response to the district court's questions, Lachmann stated unequivocally that he wished to accept the settlement. He further stated that he understood that, by doing so, he settled with finality all claims against Fairchild. Later, Lachmann accepted Fairchild's settlement check, and executed a general release in favor of Fairchild.

The trial continued on Merex's claims, and, during jury deliberations, the jury, by Jury Request No. 7, requested a reading of the trial testimony of Merex Corporation's principal, G.G. Mertins, regarding: (1) his discussions with Mr. Neasham of Fairchild about the structure of the sale with China, especially the mode of payment; and (2) his testimony regarding the feasibility of a sale/resale transaction. The district court instructed counsel to identify appropriate portions of the transcript that night, so that these portions could be read to the jury the next morning.

When the trial resumed, the district court ruled that Jury Request No. 7 called for a reading of Mertins' testimony that was limited to his direct discussions with Neasham regarding the

specific issues that the jury identified. Based on this ruling, Fairchild's counsel elected not to propose several of the transcript portions contained on the preliminary list ("preliminary list") that both sides had prepared for their own use before the court's ruling. In sharp contrast and despite the district court's repeated admonitions, Lachmann's counsel, Daniel O'Callaghan, persisted in proposing to read to the jury numerous transcript portions that had nothing whatsoever to do with Jury Instruction No. 7, as interpreted by the district court. Exasperated by O'Callaghan's repeated flouting of its orders, the district court held O'Callaghan in contempt three separate times. When O'Callaghan then attempted repeatedly, in open defiance of the district court's ruling, to have the preliminary lists marked as exhibits, the court issued a fourth contempt sanction. Later, the court set the fine for the contempt sanctions at $400.

Subsequently, Lachmann moved: (1) to rescind his settlement because he had agreed to it under duress as the district court's "trial rulings, demeanor, and unnecessary criticism of [his] counsel frightened and intimidated [him]"; and (2) to vacate the contempt sanctions against O'Callaghan. The district court denied the motion. Lachmann now appeals.

1. *Lachmann's Settlement*

A settlement is a contract that is binding and conclusive. *See Janneh v. GAF Corp.*, 887 F.2d 432 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990). Settlements, like other contracts entered into under duress, are voidable. *See U.S. West Financial Servs. v. Tollman*, 786 F. Supp. 333, 340 (S.D.N.Y. 1992). Duress has been defined as a wrongful act depriving another of the exercise of his free will. *See Printers II, Inc. v. Professionals Publishing, Inc.*, 615 F. Supp. 767 (S.D.N.Y. 1985), *aff'd*, 784 F.2d 141 (2d Cir. 1986); *see also David Nassif Assocs. v. United States*, 644 F.2d 4, 12 (Ct.Cl. 1981) ("To render an agreement voidable on grounds of duress it must be shown that the party's manifestation of assent was induced by an improper threat which left the recipient with no reasonable alternative save to agree.").

The trial record shows that Lachmann voluntarily entered into the settlement agreement. We find no wrongful conduct in the district court's prodding of Lachmann to accept the settlement. *See*

Janneh, 887 F.2d at 436 (explaining judicial policy favoring settlements). Further, he was not improperly threatened, and there were obvious alternatives to his decision to settle. Permitting Lachmann to rescind under these circumstances would violate well-settled judicial and public policies favoring out-of-court settlement, as well as deprive Fairchild of its bargained for right to avoid further proceedings with Lachmann. *See Janneh*, 887 F.2d at 436. We will not do so.

2. *Contempt Sanctions*

The district court has broad discretion to fashion an appropriate coercive remedy for a civil contempt. *N.A. Sales Co. v. Chapman Indus.*, 736 F.2d 854, 857 (2d Cir. 1984). The court's determination will not be disturbed absent abuse of discretion. *Id.* Three types of courtroom misconduct are typically subject to contempt: (1) refusal to obey court orders; (2) disrespectful remarks to the court; (3) excessive or repetitive arguments. *See United States v. Lumumba*, 794 F.2d 806, 809 (2d Cir.), *cert. denied*, 479 U.S. 855 (1986).

We find that the district court acted within its discretion in holding O'Callaghan in contempt. The trial record demonstrates that O'Callaghan willfully refused to obey the court's order regarding the proper scope of trial testimony that responded to Jury Request No. 7, and proceeded to engage in excessive, repetitive and disrespectful arguments over the issue. The $400 civil contempt fine was reasonable, and, indeed, modest.

The decision of the district court is AFFIRMED.

s/ Joseph M. McLaughlin
HON. JOSEPH M. McLAUGHLIN

s/Dennis G. Jacobs
HON. DENNIS G. JACOBS,
Circuit Judges,

s/Frank A. Kaufman
HON. FRANK A. KAUFMAN,

District Judge.

N.B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN THE UNRELATED CASES BEFORE THIS OR ANY OTHER COURT

APPENDIX C -- ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING REHEARING WITH SUGGESTION FOR REHEARING EN BANC, DATED MAY 18, 1995

UNITES STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of May, one thousand nine hundred and ninety-five.

MEREX A.G., et al.,

Plaintiffs-Appellants,

v.

FAIRCHILD WESTON SYS,

Defendant-Appellee.

Docket No.: 94-7648

/seal
UNITED STATES COURT OF APPEALS
FILED
MAY 18, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be *reheard* in banc having been filed herein by the appellants Merex A.G., et al.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED**.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT

GEORGE LANGE III, Clerk

By: s/Carolyn Clark Campbell
Carolyn Clark Campbell,
Chief Deputy Clerk

APPENDIX D -- TRANSCRIPT EXCERPTS CONCERNING CONTEMPT OF COURT UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED APRIL 29, 1992

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MEREX. A.G., MEREX CORPORATION and
PETER C. LACHMANN,

Plaintiffs,

-*v*.-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant.

85 Civ. 6596 (MJL)

CONTEMPT OF COURT

April 29, 1992
Excerpts

Before:

HON. MARY JOHNSON LOWE
District Judge

APPEARANCES

DANIEL J. O'CALLAGHAN,
BARBARA Y. WIERBICKI,
Attorneys for plaintiff
ARENT FOX McGARRAHAN & HEARD
Attorneys for defendant
ROY A. KLEIN
RONALD W. WEINER

SEAL:
U.S. DISTRICT COURT
FILED
APR. 29, 1992
S.D.N.Y.

the proposals for both sides --

THE COURT: I have ruled on it.

MR. O'CALLAGHAN: -- to sustain my position.

THE COURT: I have ruled on it. Now you bring it up again. It's another contempt. You are going to learn to accept rulings and not keep arguing.

All right.

* * *

[Handwritten]:
30 Apr. 92 Recv'd from Daniel O'Callaghan $400.00 as payment for the contempt of Court charges.

S/[Clerk]

S/Mary Johnson Lowe
U.S.D.J.

APPENDIX E -- NOTICE OF MOTION TO ADVISE THE COURT AND FOR DIFFERING PANELS AND AFFIRMATION IN SUPPORT OF MOTION, ABSENT EXHIBITS, DATED MARCH 10, 1995, AND ENDORSED ORDER DENYING RELIEF, DATED MARCH 17, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G.

v.

FAIRCHILD WESTON SYSTEMS, INC.

Docket Number: 94-7648

NOTICE OF MOTION
To Advise the Court and for Differing Panels

/seal
UNITED STATES COURT OF APPEALS
FILED
MARCH 10, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

* * *

Brief statement of the relief requested: In consequence of the continuing pendency of Appeal No. 94-9002, (Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.) and its unique nature before this Circuit, it is in the interests of justice that the Circuit assign judicial panels to these appeals of differing judges.

s/Daniel J. O'Callaghan
Appearing for: Merex A.G. & P.C. Lachmann
March 10, 1995

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/Joseph M. McLaughlin
Circuit Judge
3/17/95

/seal
UNITED STATES COURT OF APPEALS
FILED
MARCH 17, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,

Plaintiffs-Appellants,

MEREX CORPORATION,

Plaintiff,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

C.A. No. 94-7648

AFFIRMATION IN SUPPORT OF
PLAINTIFFS'-APPELLANTS'
MOTION TO ADVISE THE COURT

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion to Advise the Court (the "**Motion to Advise the Court**") of the following matters which have transpired since the Court's July 14, 1994, affirmance upon "advisory jury" of Merex's appeal -- notwithstanding FRCP Rule 16, i.e., Pre-Trial Order ("**PTO**"), requirement.[2] Oral argument upon the pending appeal is scheduled for 10 a.m. on March 20, 1995. In consequence of recent events, it appears appropriate to advise the Court as follows.

2. In consequence of the Circuit affirmance of

---

[2]Merex's Petition for Certiorari upon the affirmance filed with the United States Supreme Court, 94-736, was denied on January 9, 1995.

Merex's appeal in the manner identified, grounded upon CPLR § 205, i.e., within six (6) months as authorized by said CPLR provision, on January 10, 1995, Merex commenced a new action against Fairchild (now identified also as "Loral Fairchild Corporation" (collectively, "**Loral/Fairchild**")) in the United States District Court for the *Eastern District* of New York, Index No. 95 Civ. 0111.[3] The new action alleges Loral/Fairchild's tortious interference with Merex's prospective economic advantage and seeks declaratory relief relating to Loral/Fairchild's apparent culpability under 28 U.S.C., C.F.R. International Traffic in Arms, Parts 127, 130 ("**ITAR**"), which statute incorporates 22 U.S.C. § 2778 criminal penalty provisions, e.g.: "Any person who willfully violates ... shall upon conviction be fined for each violation not more than one million dollars or imprisoned not more than ten years, or both.".[4]

3. On February 9, 1995, counsel for the parties appeared before Judge Spatt at a recorded conference. Judge Spatt

---

[3]On January 16, 1995, Fairchild wrote to the prior District Court (MJL) addressing Fairchild's continuing unfair sanctions applications, as well as identifying the commencement of the "new" action in the Eastern District. (Copy of Fairchild letter dated January 16, 1995, annexed as "**Ex A**".)

Initially, the new action was assigned to Chief Judge Thomas C. Platt, U.S.D.J. However, in consequence of advices received relating to Chief Judge Platt's possible conflict of interest grounded upon another matter pending before this Circuit, i.e., identified as C.A. No. 94-9002 (*Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*), Merex wrote to Chief Judge Platt concerning this potential conflict. Subsequently, the new action was reassigned to Judge Arthur D. Spatt, U.S.D.J. (Copy of Merex letter dated January 19, 1995, to Chief Judge Platt, annexed as "**Ex B**".) Thereafter, on January 27, 1995, Loral/Fairchild wrote to Judge Spatt relating to the new action, in particular requesting a transfer to the prior (Southern) District Court, however, also *unnecessarily* enclosing a copy of Merex's January 19, 1995, letter to Chief Judge Platt which had identified the possible conflict issue. (Copy of Loral/Fairchild letter dated January 27, 1995, annexed as "**Ex C**".)

[4]On February 8, 1995, Merex wrote to Judge Spatt objecting to Loral/Fairchild's unnecessary enclosure of Merex's January 19, 1995, letter to Chief Judge Platt which had referenced the conflict issue, together with an outline to Judge Spatt of CPLR § 205 grounds, including explanation of tortious interference and ITAR issues supporting the new action and Merex's request for retention of an Eastern District venue. (Copy of Merex letter dated February 8, 1995, annexed as "**Ex D**".)

stated that the Court had *not* read Merex's January 19, 1995, letter to Chief Judge Platt, that the Court would not read this letter, but rather would attend to its sealing. At the conference, Judge Spatt requested that both counsel forward letters to the Court relating to Loral/Fairchild's request to transfer the matter to the prior (Southern) District Court. Accordingly, on February 14, 1995, Merex wrote to the Court addressing the transfer issue; Loral/Fairchild responded by letter dated February 17, 1995, and, as authorized by Judge Spatt, by letter dated March 8, 1995, Merex replied to this Loral/Fairchild letter. (Copy of Merex's letter dated February 14, 1995, together with enclosure, annexed as "**Ex E**"; copy of Loral/Fairchild letter dated February 17, 1995, absent enclosures, annexed as "**Ex F**"; and copy of Merex letter dated March 8, 1995, together with an enclosure denominated therein as "Ex D", i.e., certain Fanneron deposition selections, annexed as "**Ex G**".)

4. In consequence of the continuing pendency of Appeal No. 94-9002 and its unique nature before this Circuit, it appears to be in the interests of justice that in conjunction with the novel and extraordinarily unfair proceedings exemplified in the record upon this pending Merex/Lachmann appeal, that the Circuit assign judicial panels to these appeals of differing judges.

5. In consequence of the continuing pendency of the unfair and groundless contempt rulings which in part form the basis for this appeal, other matters which affect your Affirmant's professional livelihood unnecessarily and prejudicially have been affected. For example, under requirement of other Federal courts your Affirmant is required to identify the pending "contempt" rulings, together with explanation of outcome. Recently, in a matter commenced on/about February 13, 1995, in the United States District Court for the District of Maryland (SD), identified as *W.S.A., INC. d/b/a Harmon Contract v. Republic Western Insurance Company*, 95 Civ. 437 (PJM), your Affirmant has been retained on behalf of an intervenor-subcontractor in this construction dispute. The Maryland Federal court requires that said contempt rulings be referenced and explained so that your Affirmant may be authorized to appear as counsel in that action. Accordingly, in compliance with said requirement, now Affirmant is required to forward to the Maryland Federal court a comprehensive record of the proceedings relating to this

Merex/Lachmann v. Loral/Fairchild dispute, including entries relating to the pending unfair "contempt" proceedings. Accordingly, it is appropriate and necessary so to advise this Court of the present status of this dispute and of its continuing unfairness to Merex and Merex's counsel.

WHEREFORE, Merex requests that the pending appeal upon all matters appealed and as addressed in this motion relating to assignment of differing panels upon this appeal and upon that appeal identified as C.A. 94-9002 be granted.

Dated: New York, New York
March 10, 1994

s/Daniel J. O'Callaghan
Daniel J. O'Callaghan

APPENDIX F -- NOTICE OF MOTION FOR ADJOURNMENT AND REASSIGNMENT AND AFFIRMATION IN SUPPORT DATED MARCH 17, 1995 AND ENDORSED ORDER DENYING RELIEF DATED MARCH 20, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G.

v.

FAIRCHILD WESTON SYSTEMS, INC.

Docket Number 94-7648

NOTICE OF MOTION
For Adjournment and Reassignment

/seal
UNITED STATES COURT OF APPEALS
FILED
MARCH 17, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

* * *

Brief statement of the relief requested: It is in the interest of justice and impartiality that this appeal be adjourned and reassigned.

s/Daniel J. O'Callaghan
Appearing for Merex A.G. and P.C. Lachmann
March 17, 1995

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/J.M. McLaughlin, Jr.
Circuit Judge
3/20/95

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,

Plaintiffs-Appellants,

MEREX CORPORATION,

Plaintiff,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

C.A. 94-7648

AFFIRMATION IN SUPPORT
OF PLAINTIFFS'-APPELLANTS'
MOTION FOR ADJOURNMENT AND REASSIGNMENT

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion for Adjournment and Reassignment (the "**Motion for Adjournment/Reassignment**"). Oral argument upon the pending appeal is scheduled for 10 a.m. on March 20, 1995.

2. In accordance with the Court's rules, on March 16, 1995, a public listing of the Panel upon this appeal advised that two (2) of the judges upon the prior appeal in this dispute, i.e., the Merex Appeal No. 93-9286 (the "**Merex Appeal**"), are scheduled to hear the pending appeal, Appeal No. 94-7648 (the "**Lachmann Appeal**").

3. Respectfully, it is submitted that the outcome-determinative issue upon the Merex Appeal was the absence of enforcement of FRCP Rule 16 pre-trial order ("**PTO**")

requirements. Nonetheless, the prior Panel's affirmance upon "advisory jury" omitted all reference or mention of FRCP Rule 16's application to the Merex Appeal. Thus, it appears to be in the interests of justice and impartiality that the Lachmann Appeal grounded upon virtually identical non-enforcement of the PTO be adjourned in order that the appeal be reassigned.

4. Additionally, upon other grounds particularly relating to this counsel's representation before this Court upon other appeals upon baffling proceedings and outcomes, e.g., the appeal proceedings in *Olympia & York v. INA v. FEI, Ltd.*, Appeal No. 93-7547, and that appeal identified in the pending Motion dated March 10, 1995, i.e., C.A. No. 94-9002, it appears to be in the interests of justice and impartiality that the Lachmann Appeal be adjourned and reassigned.

WHEREFORE, Merex and Lachmann request that the pending appeal be adjourned and reassigned.

Dated: New York, New York
March 17, 1994

s/Daniel J. O'Callaghan
Daniel J. O'Callaghan
Attorney for Plaintiffs-Appellants
MEREX A.G. and PETER C. LACHMANN
17 Battery Place, Suite 314
New York, New York 10004
(212) 222-4200

APPENDIX G-- NOTICE OF MOTION FOR RELIEF RE SUBJECT MATTER JURISDICTION, AFFIRMATION IN SUPPORT DATED MARCH 24, 1995, FILED MARCH 27, 1995, AND ENDORSED ORDER OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING RELIEF DATED APRIL 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G.

v.

FAIRCHILD WESTON SYSTEMS, INC.

Docket Number: 94-7648

NOTICE OF MOTION

* * *

Brief statement of the relief requested: In consequence of review undertaken subsequent to oral argument relating to jurisdiction, it is appropriate to advise the Court that such subsequent review indicates that this Court appears to lack subject matter jurisdiction of this appeal. Thus, it is appropriate that the Court provide other remedy so as to assure appealability of the R. 58 Order. This motion objects to jurisdiction.

S/ Daniel J. O'Callaghan
Appearing for: Merex A.G. & P.C. Lachmann
March 24, 1995

/seal
UNITED STATES COURT OF APPEALS
FILED
MARCH 24, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

s/ Joseph M. McLaughlin
s/ Dennis G. Jacobs, per J.M.McL.
s/ F.A. Kaufman per J.M.McL.
Circuit judge

/seal
UNITED STATES COURT OF APPEALS
FILED
APRIL 7, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,

Plaintiffs-Appellants,

MEREX CORPORATION,

Plaintiff,

-against

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion Concerning Jurisdiction (the "**Motion Concerning Jurisdiction**"). Oral argument upon the pending appeal was held on March 20, 1995. In consequence of the Court's discussion relating to jurisdiction, the following motion is presented.

2. At the oral argument, the Court addressed the jurisdiction of Merex's and Lachmann's counsel, this Affirmant's, participation in the appeal of the April 29, 1992, contempt rulings. Thereafter, this Affirmant undertook a further review of applicable statutes and legal precedents relating to jurisdiction. In consequence of such further review, it is appropriate to advise the Court that at the present time, *this Court appears to lack subject matter jurisdiction of the appeal from the May 30, 1994, FRCP R. 58 Order (the "**R. 58 Order**")*. Accordingly, this Affirmant objects to the subject matter jurisdiction of this Court and requests that other remedy be implemented so as to assure appealability of the R. 58 Order.

3. The grounds for the R. 58 Motion upon which this appeal had been taken were to obtain (i) vacatur of Lachmann's settlement agreement and reinstatement of Lachmann's claims, and (ii) a "judgment" upon which an appeal of the contempt rulings could have been taken, i.e., "a judgment ... entered pursuant to Rule 58... so that an appeal of the contempt rulings may be heard ... ". (A 757-762). Nonetheless, the district court by R. 58 Order declined to grant the relief requested by Lachmann and declined to issue any "judgment" upon grounds that an endorsement concerning eleven (11) excerpted transcript pages relating to Juror Request No. 7 (the "**Endorsement**") (A782h-i) was sufficient as a "judgment", notwithstanding absent "separate document" prerequisite. It was contended to this Court that the Endorsement, itself, did *not* satisfy the "separate document" prerequisite.[5]

4. The R. 58 Order does not identify or mention any judgment relating to Lachmann. The R. 58 Order does not address the merits of the contempt rulings, rather, identifies the "Endorsement" as an appealable "judgment" notwithstanding that the "Endorsement" itself did not satisfy the "separate document" prerequisite.[6] Further, this Affirmant's post-argument review of jurisdiction revealed that the R. 58 Order *itself* does not satisfy the "separate document" prerequisite: the R. 58 Order is *not* "called" a "judgment" and is *not* set forth on a separate document "*distinct*

---

[5]*See Kanematsu-Gosho, Ltd. v. M/T Messiniaki Aigli*, 805 F.2d 47, 48-9 (2nd Cir. 1986) ("The Supreme Court has instructed that the separate document requirement '*must be mechanically applied ...*' citing *United States v. Indrelunas*, 411 U.S. 216, 221-22, 93 S.Ct. 1562, 1565, 36 L.Ed.2d 202 (1973) (per curiam)" (p. 48, emphasis added); and "... *[C]all a judgment a judgment.* Consistent with the plain language of Fed. R. Civ. P. 58 and ... [citations omitted], we therefore hold that there was no final judgment entered ... until a separate document was filed and entered ... and that document was denominated a 'judgment'. ...." (p. 49, emphasis added).

[6]At the June 14, 1994, oral argument upon Merex's appeal, this Affirmant advised the Court that the District Court had ruled upon the R. 58 Motion and that an appeal thereupon would be presented. Thereafter, pursuant to a Motion for Retention of Appendices presented to this Court, dated June 23, 1994, Merex and Lachmann advised the Court that a notice of appeal upon the R. 58 Order was being filed together with the Motion for Retention of Appendices.

from any opinion or memorandum".[7] This prerequisite was not determined until said review of jurisdiction by this Affirmant subsequent to the March 20, 1995, oral argument -- a proceeding at which neither the Court nor counsel addressed this jurisdictional bar; rather, the Court's jurisdictional inquiries centered upon questioning Affirmant's standing to appeal. Nonetheless, as the post-argument review concerns the Court's subject matter jurisdiction, this motion promptly is presented.

6. It appears that FRAP R. 42(b) may provide an appropriate remedy. However, under the circumstances of the pendency of this appeal and conclusion of oral argument, it appears appropriate that there be brought promptly to the Court's attention this subject matter jurisdictional objection. Upon fair and just terms which would include the absence of all prejudice to the filing of a subsequent notice of appeal and the taking of such appeal upon the issuance by the district court of a "judgment" upon which the subject matter jurisdiction of this Court is accomplished, such stipulation pursuant to FRAP R. 42(b) may be appropriate. However, in order to accomplish such remedy by stipulation, it appears that this Court's assistance is necessary so as to obtain from the district court said "judgment" upon the R. 58 Order which jurisdictionally may be appealed.

7. In context of the facts and circumstances of this appeal, in consequence of the objection to subject matter jurisdiction upon the grounds as herein advised, so as to avoid further delay -- and continuing prejudice to this Affirmant concerning the inability to appeal the April 29, 1995, contempt rulings -- respectfully, it appears to be in the interests of justice that this Court instruct that the district court enter a judgment that satisfies the "separate document" prerequisite so that an appeal of denial of the R. 58 Motion can be taken, or that this Court direct other remedy so as to accomplish the "separate document" appeal

---

[7]See *RR Village Ass'n, Inc. v. Denver Sewer Corp.*, 826 F.2d 1197, 1201 (2nd Cir. 1987) ("Although a one-sentence order denying a motion satisfies the separate-document requirement, ... [citations omitted], an order that is part of a district court opinion or memorandum does *not*, *see* Advisory Committee Note to 1963 Amendment of Fed.R.Civ.P. 58 (*judgment must be set forth on a separate document 'distinct from any opinion or memorandum'*) ..." (emphasis added)).

prerequisite so that such appeal may proceed.

8. Oral argument upon the Merex appeal, Appeal No. 93-9286, was heard June 14, 1994, i.e., two (2) weeks subsequent to the district court's issuance of the R. 58 Order on May 30, 1994. In consequence, by motion dated June 22, 1994, Merex and Lachmann sought the retention by the Court of appendices presented upon Appeal No. 93-9286 (the "**Appendices**") until disposition of the entire appeal. Pursuant to Order dated June 29, 1994, *inter alia*, this Court granted said motion to the extent that six (6) copies of the comprehensive Appendices instead of ten (10) copies would be acceptable for filing in a subsequent appeal.

9. As it is apparent that virtually identical Appendices will be necessitated upon any subsequent appeal from a "judgment" as a "separate document" upon the R. 58 Order, as these Appendices are comprehensive and costly to reproduce and as Merex and Lachmann lack the financial resources again to present said Appendices, respectfully, it is requested that the present Appendices upon the pending appeal, i.e., Appeal No. 94-7648, be retained by the Court or be returned by the Court to this Affirmant for supplemental filing upon any such subsequent appeal as herein addressed.

WHEREFORE, Merex and Lachmann request that this Court dismiss this appeal upon absence of subject matter jurisdiction, without prejudice, and/or direct that a FRAP R. 42(b) remedy be obtained, and/or provide other remedy so as to accomplish appealability of the R. 58 Order, and that all other relief requested in this motion be granted.

Dated: New York, New York
March 24, 1994

s/Daniel J. O'Callaghan
Daniel J. O'Callaghan, Esq.
Attorney for Plaintiffs-
Appellants MEREX A.G. and
PETER C. LACHMANN
17 Battery Place, Suite 314
New York, New York 10004
(212) 222-4200

APPENDIX H - NOTICE OF MOTION FOR RELIEF RELATING TO EN BANC REHEARING AND AFFIRMATION IN SUPPORT, DATED APRIL 12, 1995 AND ENDORSED ORDER GRANTING IN PART RELIEF REQUESTED DATED APRIL 26, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,
Plaintiff, Appellants,

MEREX CORPORATION,
Plaintiff,

v.

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant-Appellee.

Docket Number 94-7648

NOTICE OF MOTION
For Relief relating to En Banc Rehearing

* * *

Brief statement of the relief requested: An order granting additional time and additional pages concerning a Petition for Rehearing En Banc. An order authorizing that there be annexed to the En Banc Petition for Rehearing a copy of the transcript pages of the April 29, 1992, proceeding so that the contempt rulings justly may be reviewed.

s/Daniel J. O'Callaghan
Appearing for Merex A.G., et al.
4/12/95

/seal
UNITED STATES COURT OF APPEALS
FILED
APRIL 13, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is granted [Handwritten:]

to the extent that the petition for rehearing with suggestion for rehearing in banc (1) shall be not more than 30 pages, (2) may be filed on or before May 5, 1995, and (3) may include up to 10 pages of transcript from the 5/10/92 hearing provided same was furnished to panel in appendix. 4/-26-95.

s/Dennis Jacobs
Circuit Judge

/seal
UNITED STATES COURT OF APPEALS
FILED
APRIL 26, 1995
GEORGE LANGE, III, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,

Plaintiffs-Appellants,

MEREX CORPORATION,

Plaintiff,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,

Defendant-Appellee.

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion Relating to *En Banc* Rehearing (the "**Motion Relating to *En Banc* Rehearing**").

2. In context of the record in these proceedings since 1985, the Summary Order affirmance dated April 7, 1995, and the requirement for submission of any *en banc* rehearing within fourteen (14) days, i.e. on/before April 21, 1995, the following relief is requested:

> (i) the grant of permission to serve and file a Petition for Rehearing *En Banc* (the "**Petition**") of no more than thirty (30) pages in length;
>
> (ii) the grant of permission authorizing that there be annexed to the Petition a copy of the transcript pages of the April 29, 1992, proceedings so that the contempt rulings justly may be reviewed;

(iii) the grant of an extension of time for service and filing of the Petition to and until May 5, 1995;

WHEREFORE, Merex and Lachmann request that this Court grant all relief requested in this motion.

Dated: New York, New York
April 12, 1995

s/Daniel J. O'Callaghan
Daniel J. O'Callaghan, Esq.
Attorney for Plaintiffs-
Appellants MEREX A.G. and
PETER C. LACHMANN
17 Battery Place, Suite 314
New York, New York 10004
(212) 222-4200

APPENDIX I -- NOTICE OF MOTION AND AFFIRMATION IN SUPPORT OF MOTION FOR RELIEF CONCERNING JURISDICTION AND EN BANC PROCEEDINGS, ABSENT EXHIBITS, DATED MAY 22, 1995 AND ENDORSED ORDER DENYING RELIEF DATED JUNE 7, 1995

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G.

v.

FAIRCHILD WESTON SYSTEMS, INC.

Docket Number: 94-7648

NOTICE OF MOTION
For relief concerning Jurisdiction
& En Banc Proceedings

* * *

Brief statement of the relief requested: In consequence of the series of otherwise unexplainable appeal proceedings in which this counsel has appeared, i.e., that appeal identified as *Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.*, C.A. No 94-9002, and *Olympia & York v. INA v. FEI, Ltd.*, C.A. No. 93-7547, it is appropriate that an explanation be provided by the Court.

s/Daniel J. O'Callaghan
Appearing for: Merex A.G. & P.C. Lachmann

May 22, 1995

ORDER

IT IS HEREBY ORDERED that the motion be and it hereby is denied.

S/J. M. McLaughlin

S/ D. G. Jacobs (per J.M. McL)

S/ F. A. Kaufman (per J.M. McL.)
Circuit Judge

Seal/
UNITED STATES COURT OF APPEALS
FILED
JUNE 7, 1995
GEORGE LANGE III, CLERK
SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MEREX A.G. and PETER C. LACHMANN,
Plaintiffs-Appellants,

MEREX CORPORATION,
Plaintiff,

-against-

FAIRCHILD WESTON SYSTEMS, INC.,
Defendant-Appellee.

C.A. No. 94-7648

AFFIRMATION IN SUPPORT OF
PLAINTIFFS'-APPELLANTS'
MOTION CONCERNING JURISDICTION
-and-
EN BANC PROCEEDINGS

I, Daniel J. O'Callaghan, attorney on behalf of Plaintiffs-Appellants Merex A.G. ("**Merex**") and Peter C. Lachmann ("**Lachmann**") do affirm under penalty of perjury:

1. I submit this affirmation in support of Merex's and Lachmann's Motion Concerning Jurisdiction and *En Banc* Proceedings (the "**Motion Concerning Jurisdiction and *En Banc* Proceedings**"). This motion is presented in consequence of proceedings held before this Court which objectively appear to evidence the absence of fairness throughout this dispute as well as the absence of fairness concerning other disputes upon appeals to this Court presented by this counsel which in *toto* appear to support the existence of an unfair effort to discredit and otherwise adversely affect this counsel. For example, this motion is grounded not only upon this Court's unfair affirmances in both this Merex/Lachmann appeal -- as well, the initial Merex appeal -- but also upon two (2) other matters, viz., that appeal identified as *Alison E. Clapp v. LeBoeuf, Lamb, Leiby & MacRae, et al.* (the

"**LeBoeuf, Lamb Appeal**"), C.A. No. 94-9002, and *Olympia & York v.INA v. FEI, Ltd.*, (the "**O&Y Appeal**") C.A. No. 93-7547 (*en banc* petition filed September 29, 1994), both of which other appeals appear to evidence a similar absence of any proper grounds for denial of all relief, rather, appear to support unfair proceedings concerning this counsel and his clients, especially his client in the LeBoeuf, Lamb Appeal and the facts and circumstances concerning that dispute which have particular significance to this Court.

2. On April 12, 1995, in the matter identified as *Merex A.G. v. Loral Fairchild Corporation and Fairchild Weston Systems, Inc.*, 95 Civ. 0111 (ADS) (EDNY) (the "**Loral/Fairchild Action**"), Merex wrote to the court in that matter requesting adjournment of submission of opposition papers to a Loral/Fairchild motion to dismiss and for sanctions. (Copies of two (2) Merex letters together with enclosures, dated April 12, 1995, annexed as "**Ex 1**"). By Order dated April 13, 1995, the court denied Merex's application. In consequence, by facsimile dated April 14, 1995, Merex requested reconsideration grounded upon the facts and circumstances addressed in Merex's two (2) April 12, 1995, letters, together with additional facts relating to absence of staff and upon medical circumstance. Subsequently, during a lengthy telephone conference held on April 18, 1995, by Order of same date, the court upon reconsideration granted Merex's request for extension of time for submission of opposition papers. (Copies of the Orders dated April 13, 1995, and April 18, 1995, together with Merex's counsel's facsimile dated April 14, 1995, annexed as "**Ex 2**").

4.[sic] Contemporaneously, on April 13, 1995, Merex/Lachmann filed a motion requesting "Relief relating to *En Banc* Rehearing" ("**Motion/*En Banc***"), in particular requesting (i) an extension of time for submission of an *en banc* petition; (ii) authorization for additional pages; and (iii) inclusion of trial transcript excerpts. As disposition of this motion was not made in reasonable time for effect upon the relief requested therein, so as to comply with the *en banc* rehearing time limitation which necessitated filing of *en banc* application by April 21, 1995, timely, Merex/Lachmann on April 21, 1995, filed an *en banc* petition (the "***En Banc* Petition**").

5. Nearly two (2) weeks subsequent to the filing of the Motion/*En Banc* -- an application upon which the Court had

not ruled -- and four (4) days subsequent to the filing of the *En Banc* Petition, this counsel, on April 25, 1995, filed an additional *en banc* petition in the LeBoeuf, Lamb Appeal . Thereafter, by Order dated the next day, April 26, 1995, this Circuit granted in part the Motion/*En Banc* (the "***En Banc* Order**"), which notwithstanding filed April 26, 1995, was not mailed to this counsel until April 29, 1995, and was not received until May 2, 1995, i.e., just three (3) days prior to the May 5, 1995, limitation for filing of modified *en banc* petition therein as so authorized, a circumstance which precluded this counsel's ability to act upon the *En Banc* Order. (Copies of *En Banc* Order dated April 26, 1995, together with Second Circuit forwarding envelope postmarked April 29, 1995, together annexed as "**Ex 3**"). In the interim, this motion has been delayed in presentation, *inter alia*, in consequence of this counsel's required participation as counsel of record and other circumstances as addressed upon those other matters identified in the April 12, and April 14, 1995, letters, *supra*.

6. In consequence of the series of otherwise unexplainable appeal proceedings in which this counsel has appeared, respectfully, it is requested that there be provided a statement which addresses the: (i) grounds for absence of enforcement -- and non-mention -- of R. 51 and R. 58 apparent controlling facts, circumstances and precedent upon the pending Merex/Lachmann appeal, (ii) grounds of jurisdiction upon the contempt rulings, and (iii) grounds of timing of issuance of the Order/*En Banc*.

WHEREFORE, Merex/Lachmann requests that all matters requested in this motion be granted.

Dated: New York, New York
May 22, 1995

s/Daniel J. O'Callaghan
Daniel J. O'Callaghan, Esq.
Attorney for Plaintiffs-
Appellants MEREX A.G. and
PETER C. LACHMANN
17 Battery Place, Suite 314
New York, New York 10004
(212) 222-4200

(2)

Supreme Court, U.S.
FILED
SEP 8 1995
CLERK

No. 95-247

In The

Supreme Court of the United States

October Term, 1995

MEREX A.G. and PETER C. LACHMANN,

Petitioners,

v.

FAIRCHILD WESTON SYSTEMS, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

ROY A. KLEIN
Counsel of Record and Attorney for Respondent Fairchild Weston Systems Inc.
One Huntington Quadrangle
Suite 2C13
Melville, New York 11747-4409
(516) 694-6935

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

1. Whether the District Court acted properly in denying Peter Lachmann's motion to rescind the settlement agreement that he voluntarily entered into during trial more than two years earlier.

2. Whether the District Court acted within its discretion in holding plaintiffs' counsel, Daniel J. O'Callaghan, in contempt for his repeated refusals during trial to comply with the Court's ruling concerning the proper scope of the testimony to be read back to the jury during their deliberations in response to Jury Request Number 7.

3. Whether the Second Circuit had subject matter jurisdiction to decide plaintiffs' appeal from the May 30, 1994 order of United States District Court Judge Mary Johnson Lowe.

PARTIES

Respondent, Fairchild Weston Systems Inc., was a wholly owned subsidiary of Schlumberger Limited, Schlumberger Technology Corporation and Sangamo Weston, Inc. On July 27, 1989 – during the pendency of this action – the assets and liabilities of Fairchild Weston Systems Inc. were purchased by Loral Computer Systems Corporation, which subsequently changed its name to Loral Fairchild Corp. Loral Fairchild Corp. is a subsidiary of Loral Corporation. Respondent is referred to in this brief as Fairchild.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

1. The District Court Properly Denied Lachmann's Motion To Rescind His Settlement Agreement For Duress 4

2. The District Court Properly Acted Within Its Sound Discretion When It Held O'Callaghan In Contempt 8

3. The Second Circuit Had Subject Matter Jurisdiction To Decide Plaintiffs' Appeal 9

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Janneh v. GAF Corp., 887 F.2d 432 (2d Cir. 1989) ... 4, 5, 7

Kothe v. Smith, 771 F.2d 667 (2d Cir. 1985) 7

N.A. Sales Co., Inc. v. Chapman Industries Corp., 736 F.2d 854 (2d Cir. 1984) 8

Polito v. Polito, 121 A.D.2d 614, 503 N.Y.S. 2d 867 (2d Dep't 1986) 6

Record Club Of America, Inc. v. United Artists Records, Inc., 611 F. Supp. 211 (S.D.N.Y. 1985) 6

U.S. v. Lumumba, 794 F.2d 806 (2d Cir. 1986), *cert. denied*, 479 U.S. 855 8

U.S. West Financial Services, Inc. v. Tollman, 786 F. Supp. 333 (S.D.N.Y. 1992) 5, 6

STATUTES

United States
28 U.S.C § 1291 9

New York State
N.Y. C.P.L.R. § 3004 (McKinney's 1991) 8

RULES

Federal Rules of Civil Procedure
Rule 16 7

Rule 51 9

Rule 54(a) 9

Rule 58 9

TABLE OF AUTHORITIES – Continued

Page

Rules of the Supreme Court of the United States
Rule 10 3

Rule 14.5 3

STATEMENT OF THE CASE[1]

Peter Lachmann commenced this action in August, 1985 to recover a $1.2 million commission allegedly owing under a 1983 sales representation agreement with Fairchild. His complaint alternatively alleged breach of contract, *quantum meruit* and promissory estoppel.[2]

Fairchild contended throughout the case that Lachmann's breach of contract claim was barred by the express terms of his written agreement, which plainly and unambiguously conditioned Lachmann's commission upon Fairchild's sale of camera systems ***to Merex*** for resale to the People's Republic of China – a transaction that undisputedly never occurred. Fairchild also contended that the existence of this written contract precluded Lachmann as a matter of law from recovering on alternative theories such as *quantum meruit* and promissory estoppel.

During trial, the District Court urged the parties to settle Lachmann's claims, and Lachmann agreed to accept Fairchild's offer of $150,000. The settlement was then placed on the record. Lachmann's counsel, Daniel J. O'Callaghan ("O'Callaghan"), represented to the District Court that he recommended that Lachmann accept the

---

[1] Fairchild adopts and incorporates by reference the summary of facts and proceedings contained in the Second Circuit's summary order, dated April 7, 1995 (*see* Appendix B at 6a-7a).

[2] Co-plaintiff Merex A.G. ("Merex") also sought damages from Fairchild under various alternative theories of recovery. Merex's claims were dismissed after trial (810 F. Supp. 1356 (S.D.N.Y. 1993)), the District Court's dismissal was affirmed by the Second Circuit (29 F.3d 821 (2d Cir. 1994)) and the Supreme Court denied Merex's petition for certiorari on January 9, 1995.

settlement amount. In response to the District Court's questions, Lachmann stated unequivocally that he wished to accept the settlement amount and understood that, by doing so, he was settling with finality his claims against Fairchild. Lachmann thereafter accepted Fairchild's settlement check in the amount of $150,000 and executed a general release in favor of Fairchild.

Following the settlement of Lachmann's claims, the trial continued as to Merex's promissory estoppel claim, with the jury sitting in an advisory capacity. During jury deliberations, by Jury Request No. 7, the jury requested a reading of the trial testimony of Merex's principal, G.G. Mertins, regarding: (1) his discussions with Mr. Neasham of Fairchild about the structure of the sale with China, especially the mode of payment and (2) his testimony regarding the feasibility of a sale/resale transaction. The District Court instructed counsel to identify proposed, appropriate portions of the transcript overnight, to be read to the jury the following morning.

When the trial resumed, the District Court ruled that Jury Request No. 7 called for a reading of Mr. Mertins' testimony only with respect to his ***direct discussions*** with Mr. Neasham regarding the specific issues identified by the jury. Based on this ruling, Fairchild's counsel elected not to propose a number of transcript portions contained on the preliminary list that counsel had prepared in advance of the court session. In sharp contrast, and despite the Court's repeated admonitions, O'Callaghan persisted in proposing to read to the jury numerous transcript portions that had nothing whatsoever to do with Jury Instruction No. 7, as interpreted by the District Court.

Exasperated by O'Callaghan's refusal to abide by its orders, the District Court held O'Callaghan in contempt three separate times. When O'Callaghan then attempted repeatedly – in defiance of the Court's ruling – to have the preliminary lists marked as exhibits, the Court issued a fourth contempt citation and later set the total fine for contempt at $400.

In February, 1994 – nearly two years after the conclusion of the trial – appellants moved to rescind the Lachmann settlement and to seek relief from the contempt citations. By order dated May 30, 1994, the District Court denied the motion (*see* Appendix A). The Second Circuit affirmed (*see* Appendix B) and also rejected some six separate motions by Lachmann and O'Callaghan seeking various relief (*see* Appendices C, E, F, G, H and I). The instant petition for certiorari followed.

REASONS FOR DENYING THE WRIT

Lachmann's petition for a writ of certiorari should be denied because the petition does not establish any "special and important reasons" for granting the writ, as required by Rule 10 of the Rules of this Court.[3] To the

[3] The petition also should be denied pursuant to Rule 14.5 of the Rules of this Court because it is inadequate on its face in that it fails to clearly and accurately present the points that Lachmann believes to require consideration. Indeed, the petition is largely devoted to a re-hash of issues concerning the conduct of the trial on Merex's claims. These issues are entirely irrelevant to this appeal and, in any case, for the most part already have been rejected by the Supreme Court's denial of Merex's previous certiorari petition.

contrary, the record in this case establishes that the decision below turned on its own facts. Moreover, the District Court's denial of Lachmann's motion to rescind his settlement agreement was correct and followed precedent (*see* 1 below); its contempt citations against O'Callaghan involved the sound exercise of its discretion (*see* 2 below). Finally, Lachmann's assertion that the Second Circuit lacked subject matter jurisdiction to decide his appeal because the District Court order appealed from (Appendix A) was not a "final judgment" is frivolous (*see* 3 below).

1. The District Court Properly Denied Lachmann's Motion To Rescind His Settlement Agreement For Duress

In affirming the District Court's denial of Lachmann's February, 1994 motion to rescind the settlement agreement he voluntarily entered into during trial two years earlier, the Second Circuit relied upon well-settled case law for the proposition that a settlement agreement is a binding contract that can be rendered voidable on grounds of duress only upon a showing that the party's assent was induced by an improper threat that left the party with no reasonable alternative but to agree (Appendix B at 7a). It then agreed with the District Court that the trial record showed that Lachmann had voluntarily entered into the settlement agreement, and concluded that there was no wrongful conduct in the District Court's prodding Lachmann to settle (Appendix B at 7a-8a, citing *Janneh v. GAF Corp.*, 887 F.2d 432, 436 (2d Cir. 1989), *cert. denied*, 498 U.S. 865 (1990)). Finally, the Second Circuit held that permitting Lachmann to rescind under

the circumstances of this case would violate well-settled judicial and public policies favoring out-of-court settlements and would also deprive Fairchild of its bargained-for right to avoid further proceedings with Lachmann (Appendix B at 8a, citing *Janneh*, 887 F.2d at 436).

The Second Circuit's determinations were correct in that they applied the undisputed facts to well-established principles of law. Indeed, Lachmann's assertion of duress was insufficient as a matter of law for two separate reasons.

First, Lachmann did not even come close to satisfying any of the four requirements for proving economic duress, *to wit*: (a) a threat; (b) unlawfully made; (c) which caused involuntary acceptance of contractual terms; (d) because the circumstances permitted no alternative. *U.S. West Financial Services, Inc. v. Tollman*, 786 F. Supp. 333, 338-340 (S.D.N.Y. 1992). Indeed, Lachmann did not even allege the existence of any "threat" from Fairchild but, rather, claimed to have been coerced by his fear of losing at trial. Such a fear is legally insufficient to support a claim to rescind a settlement agreement for duress. *See Janneh, supra*, 887 F.2d at 437.

Similarly, there was no showing of unlawful conduct by Fairchild or the District Court; of Lachmann's involuntary acceptance of the settlement; or of the absence of a practical alternative to Lachmann's acceptance of the settlement. To the contrary, the trial record established that Lachmann evaluated his options and knowingly elected to settle his claim rather than incur the additional time and expense necessary to continue to pursue the case through the end of trial and any appeals. This scenario –

which is a regular occurrence in civil/commercial litigation – does not give rise to a claim for economic duress. *See, e.g., Record Club Of America, Inc. v. United Artists Records, Inc.*, 611 F. Supp. 211, 216 (S.D.N.Y. 1975) (Court declined to rescind a settlement agreement and release on duress and economic coercion grounds, ruling that plaintiff had a practical alternative to entering into the release – negotiating a narrower release).

Second, and even assuming for purposes of Lachmann's arguments that he did agree to the settlement under duress, he still would not be entitled to rescind it at this late date. The existence of duress would merely render the settlement voidable, not void. *See U.S. West Financial Services, Inc., supra*, 786 F. Supp. at 340. Lachmann therefore would be deemed to have ratified the settlement, thus barring his present attempt to rescind, unless he repudiated the settlement in a timely manner. *Id.* at 341. The record establishes that Lachmann did not make any such timely repudiation.

To the contrary, Lachmann waited nearly two years after accepting the benefits of the settlement before attempting to challenge it. At that time, he gave no explanation for his delay. Thus, there is no question that Lachmann ratified the settlement by his failure to repudiate it in a timely manner.[4]

---

[4] Lachmann's reliance on *Polito v. Polito*, 121 A.D.2d 614, 503 N.Y.S.2d 867 (2d Dep't 1986), for the proposition that the "timing of Lachmann's motion to vacate does not preclude this relief" (petition at 24, note 15) is wildly misplaced. In that case, an 18 month delay in a plaintiff wife's bringing an action to rescind a divorce settlement was excused due to unique and

Lachmann's petition makes no serious attempt to rebut this overwhelming legal and factual record. Rather, it merely cites *Janneh, supra,* 887 F.2d at 432-433, for the general proposition that "settlement agreement may be challenged upon showing that signed under pressure" (petition at 24). This misses the point, since neither Lachmann nor the plaintiff in *Janneh* made the factual showing necessary to establish duress.[5]

In short, the Second Circuit's determination here fully considered and correctly decided the issue of Lachmann's entitlement to rescind the settlement he entered into during trial, and Lachmann has not raised any issue on this point for review under Rule 10 of the Rules of this Court. Accordingly, Lachmann's petition should be denied.[6]

---

special circumstances – the record showed that the wife had been a victim of a pattern of physical and mental spousal abuse that, following the settlement, had led to a suicide attempt and psychiatric hospitalization. The record in the instant case is devoid of any similar circumstances that would justify or excuse Lachmann's two-year delay in seeking rescission.

[5] Lachmann's reliance upon *Kothe v. Smith,* 771 F.2d 667 (2d Cir. 1985) (petition at 24) for the proposition that the District Court acted improperly by encouraging him to settle is also misplaced. In *Kothe,* the Second Circuit reversed a District Judge's imposition of sanctions on defendant for its settlement during trial in an amount that the Judge had recommended during a pre-trial conference, holding that such conduct was beyond the Judge's power under Fed. R. Civ. P. 16. *Kothe* is therefore entirely irrelevant to the instant appeal.

[6] Even assuming for purposes of Lachmann's arguments that he were somehow entitled to rescind the settlement agreement, any such rescission should require his immediate, unconditional return to Fairchild of its $150,000 settlement payment,

2. The District Court Properly Acted Within Its Sound Discretion When It Held O'Callaghan In Contempt

It is well-established that a District Court has broad discretion to fashion an appropriate coercive remedy in a case of civil contempt, and its determination will not be disturbed absent a clear showing of abuse of discretion. *N.A. Sales Co., Inc. v. Chapman Industries Corp.*, 736 F.2d 854, 857 (2d Cir. 1984). In circumstances involving trial counsel, three types of courtroom misconduct are typically recognized as being subject to contempt: (a) refusal to obey court orders; (b) disrespectful remarks to the Court; and (c) excessive or repetitive argument. *U.S. v. Lumumba*, 794 F.2d 806, 809 (2d Cir. 1986). Moreover, other behavior of the lawyer during trial can be considered in determining whether a particular act is sufficiently contumacious to constitute contempt. *Id.* at 811-813.

Given these standards – which the petition conveniently ignores – there is no question that the District Court acted well within its discretion in holding O'Callaghan in contempt. The trial record established that O'Callaghan willfully refused to obey – and then engaged in excessive and repetitive argument over – the District Court's order regarding the proper scope of trial testimony to be read back to the jury in response to Jury Request No. 7. This conduct – which came near the end of a 2 and 1/2 week trial and threatened to delay and

---

together with interest from May, 1992. *See* New York C.P.L.R. § 3004 (McKinney's 1991).

disrupt the orderly judicial process – was properly viewed in the context of O'Callaghan's other behavior during trial. Under these circumstances, the fines that the District Court levied against O'Callaghan were modest.

Unable to show that the District Court abused its discretion by holding O'Callaghan in contempt, the petition does not even attempt to do so. Instead, it cites Fed. R. Civ. P. 51 and several cases applying that Rule for the proposition that a lawyer has the duty to preserve for appeal each of his objections to a court's jury charge (petition at 24-25). These cases are entirely irrelevant to the contempt citations issued against O'Callaghan, which had nothing whatsoever to do with the Court's jury charge. Accordingly, the petition does not raise any question on this point for review by the Supreme Court.

3. The Second Circuit Had Subject Matter Jurisdiction To Decide Plaintiffs' Appeal

No doubt recognizing the weakness of the merits of their appeal, plaintiffs contended for the first time following oral argument before the Second Circuit that the appellate court lacked jurisdiction over their own appeal because the order they appealed from was not a "final judgment." This contention is frivolous.

Specifically, the May 30, 1994 order appealed from (Appendix A) complied on its face with Fed. R. Civ. P. 54 (a) and 58 in that it was set forth on a separate piece of paper, was denominated an order and constituted a final decision from which an appeal as of right lay, in accordance with 28 U.S.C. § 1291. The petition (at 23) merely

references the general rule; it cites no authority supporting dismissal of the appeal for lack of subject matter jurisdiction based on the circumstances presented here. Accordingly, it raises no issue for review by this Court.

CONCLUSION

For these reasons, Fairchild respectfully requests that this petition for a writ of certiorari be denied.

Melville, New York
September 8, 1995

Respectfully submitted,

ROY A. KLEIN
Counsel of Record and
Attorney for Respondent
Fairchild Weston Systems Inc.
One Huntington Quadrangle
Suite 2C13
Melville, NY 11747-4409
(516) 694-6935